TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 106.

ABIGAIL K. CAMPBELL PARKER, APPELLANT,

vs.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, AND CECIL BROWN, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED MARCH 19, 1908.

(21,076.)

(21,076.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 106.

ABIGAIL K. CAMPBELL PARKER, APPELLANT,

vs.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, AND CECIL BROWN, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

INDEX.

	Original.	Print.
Proceedings in Circuit Court of the First Circuit	1	1
Petition for construction of will	1	1
Copy of the will of James Campbell, deceased	12	7
Answer of Abigail K. Campbell Parker	24	13
Answer of Alice K. Macfarlane	29	16
Answer of Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa and —— Kawananakoa, minors	33	19
Answer of Abigail W. Kawananakoa	39	23
Answer of Muriel K. Campbell and Beatrice U. (Mary) Campbell, minors	45	27
Transcript of testimony	51	31
Testimony of Cecil Brown	51	31
Circuit court clerk's minutes, dated March 23, April 2, and May 15, 1906	63	37
Petition for probate of the will of James Campbell, deceased, filed April 20, 1900	65	39
Order admitting will to probate, dated June 26, 1900	67	40
Bond of executrix and executors, filed June 29, 1900	69	41
Letters testamentary, filed June 29, 1900	71	42

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1909.

	Original.	Print.
Petition of executrix and executors for allowance of accounts, final distribution, and discharge, dated August 25, 1902	72	42
Schedule "C" to accounts, filed August 25, 1902	74	43
Recapitulation	75	44
Order of notice of hearing petition for allowance of accounts, etc., filed August 25, 1902	82	50
Affidavit of publication of notice of hearing petition for allowance of accounts, etc	84	51
Master's report, filed November 5, 1902	85	52
Testimony of Cecil Brown	86	52
Princess Kawananakoa	92	57
Joseph O. Carter	93	57
O. G. Traphagen	93	57
Fred Harrison	94	57
Joseph O. Carter (recalled)	95	58
Sworn statement of Cecil Brown	99	60
Decision of Hon. Geo. D. Gear, filed June 12, 1903	108	66
Notice of appeal and appeal by executrix and executors from decision of Hon. Geo. D. Gear, filed June 12, 1903	148	90
Schedule "C" to supplementary account, filed June 29, 1903	149	91
Clerk's minutes circuit court, dated August 8, 18, and 31, 1900; April 21, May 13, 15, 22, and June 20, 1905	150	92
Petition of executrix and executors for approval of accounts, etc., filed January 4, 1904	156	95
Schedule "C" to supplementary account, filed January 4, 1904	160	97
Master's report, filed March 8, 1904	161	98
Order for hearing on master's report, filed May 4, 1904	175	107
Schedule "C" to supplementary account, filed May 14, 1904	176	108
Master's report, filed May 17, 1904	177	109
Exceptions, filed May 17, 1904, by executrix and executors to the master's report, filed March 19, 1904	181	111
Exceptions of Cecil Brown, one of the executors, to findings of master	186	114
Decision of Hon. Geo. D. Gear on final accounts, filed July 25, 1904	187	115
Order, dated August 1, 1904, in accordance with decision rendered by Hon. Geo. D. Gear on June 12, 1903, and July 25, 1904	198	121
Notice of appeal and appeal of executrix and executors from the order of Hon. Geo. D. Gear, dated August 1, 1904	202	123
Opinion of the Supreme Court, rendered March 8, 1905	204	124
Remittitur from Supreme Court	213	129
Schedule "C" to final supplementary account, filed April 17, 1905	214	130
Notice to J. J. Dunne, Esq., counsel for Abigail Kawananakoa, of hearing on final supplementary account, dated April 18, 1905	215	130
Master's report, filed May 3, 1905	216	131
Order approving accounts and discharge of executrix and executors, dated July 3, 1905	222	135
Receipt of trustees to executrix and executors	227	138
Bond of trustees	230	140
Decree of Hon. Alexander Lindsay, Jr., entered June 25, 1906	231	141

	Original.	Print.
Notice of appeal and appeal of Abigail K. Campbell Parker	234	143
Notice of appeal and appeal of Abigail Helen Kapiolani Kawananakoa, David Kalakana Kawananakoa, and —— Kawananakoa, minors	235	143
Notice of appeal and appeal of Abigail W. Kawananakoa	236	144
Notice of appeal and appeal of Muriel K. Campbell and Beatrice U. (Mary) Campbell, minors	238	146
Notice of appeal and appeal of Alice K. Macfarlane	242	148
Opinion of the Supreme Court, rendered October 29, 1906	244	149
Petition of Abigail W. Kawananakoa for rehearing in the Supreme Court and notice of petition	255	158
Opinion of the Supreme Court on the petition for rehearing, rendered November 23, 1906	261	162
Judgment Supreme Court	263	163
Appeal of Abigail K. Campbell Parker, one of the respondents, to the United States Supreme Court and order allowing appeal	264	163
Citation to appellees and acknowledgment of service thereof	265	164
Assignment of errors	268	166
Affidavit of George L. Bigelow as to value	271	167
Bond on appeal	272	168
Præcipe designating parts of record to be included in transcript	274	169
Certificate of clerk to transcript of record	277	171

1 In the Circuit Court of the First Circuit Territory of Hawaii, at Chambers. In Equity.

($2. Stamps.)

Bill for Construction of Will.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Petition.

To the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, or other the Judge of the said Court, presiding at Chambers.

Humbly complaining, show unto your Honor, Abigail K. Campbell Parker, Joseph O. Carter, and Cecil Brown, all of Honolulu, Island of Oahu, Territory of Hawaii, Trustees under the will and of the Estate of James Campbell, late of Honolulu aforesaid, deceased, complainants herein, as follows:

1. That the said James Campbell died on or about the 21st day of April, 1900, seized and possessed of a considerable estate, both real and personal, situate in the Territory of Hawaii and elsewhere, and leaving a last Will and Testament, duly executed and published on the 8th day of July, 1896, in which complainants herein are
2 named as Executrix and Executors thereof respectively and Trustees (a copy of which last Will and Testament is hereunto annexed, made a part thereof and marked Exhibit "A");

2. That, on the 26th day of June, 1900, the said last Will and Testament was duly admitted to probate by a judge of the Circuit Court of the First Circuit, Territory of Hawaii, sitting at Chambers, in Probate, the appointment of the complainants as Executrix and Executors respectively of the said will was confirmed and letters testamentary were duly issued to the complainants;

3. That the complainants herein, as Executrix and Executors respectively of said Will, have paid all claims against the estate of the said James Campbell, deceased, and all legacies provided for by said will; that they have duly rendered their administration accounts of all their proceedings in the settlement of the said estate, which accounts have been examined and approved by the said Court; and that by order of Honorable A. Lindsay, Second Judge of the said Court, duly made and filed on the third day of July, 1905,

complainants were discharged as such Executrix and Executors and they were directed to distribute and have distributed to themselves, as residuary devisees and legatees in trust, the residue of the property, real and personal, belonging to the said estate:

4. That said James Campbell, deceased, left surviving him a widow, Abigail K. Campbell, who thereafter was and is now married to one Samuel Parker, of Honolulu aforesaid, and who, under the name of Abigail K. Campbell Parker, is one of the complainants and respondents herein; and as his heirs at law and next of kin, four daughters, to wit, Abigail W. Kawananakoa, formerly Abigail W. Campbell, and now the wife of David Kawananakoa, of Honolulu aforesaid; Alice K. Macfarlane, formerly Alice K. Campbell,
3 and now the wife of Walter Macfarlane, of Honolulu aforesaid; Muriel K. Campbell and Beatrice U. Campbell, described in the said will as Mary Campbell; all residing in Honolulu aforesaid, and herein named as respondents; that the respondent Abigail W. Kawananakoa attained her legal majority on the first day of January, 1900; that the respondent Alice K. Macfarlane, on the 17th day of March, 1903, attained her legal majority; and that the respondents Muriel K. Campbell and Beatrice U. (Mary) Campbell are minors and of the age of fourteen years and ten years, respectively;

5. That, since the death of the said James Campbell, there have been born to the said *Ba*igail W. Kawananakoa three children, to wit, Abigail Helen Kapiolani Kawananakoa, a daughter who was born on the 14th day of March, 1903, David Kalakaua Kawananakoa, a son, who was born on the 10th day of March, 1904, and —— Kawananakoa, a daughter, who was born on the 22d day of July, 1905, and who has not up to the date of the filing of this petition been christened all of whom are named as respondents herein:

6. That the respondents are each and all legatees and devisees under and by virtue of the provisions of said last will and testament.

7. That the real property belonging to the said estate and held by the complainants as such Trustees as aforesaid is of the value of $900,000, or thereabouts and the annual rentals from the said real property amount to the sum of $80,000, or thereabouts; that the personal property of the said estate in the hands of the complainants, Trustees as aforesaid, is of the value of $700,000, or thereabouts, and is invested so as to yield an annual income of $40,000, or thereabouts:

8. That it was provided in and by the 8th clause of the said will that the complainants, Trustees as aforesaid, should segregate,
4 keep separate and apart during life of said A. K. C. Parker the accounts of and pertaining to the realty of the said estate from the accounts pertaining to any and all other property of the said estate:

9. That doubts have arisen in the minds of the complainants as to the true construction of certain of the provisions and trusts contained in the said will, among which are the following:

1st. That in and by the First Clause of the said Will, the Executrix and Executors thereof were directed to reduce to possession all

and singular the Testator's estate, real, personal and mixed, and wheresoever situated; to manage, control, care for and collect the income and revenue thereof, pending the distribution thereof as in the said will thereafter provided; to catalogue, inventory and appraise the same and secure an adjudication by the Court of the Hawaiian Islands, having jurisdiction over such matters, of the value thereof; that in and by the Second Clause of the said will, the Executrix and Executors thereof were directed to pay and discharge all debts which should be outstanding against the Testator or his estate, including all expenses of his last illness and funeral; that in and by the Third Clause of the said will the Testator bequeathed to the said Abigail K. Campbell Parker, complainant and respondent herein, a sum of money equal and equivalent to a one-third proportion of the sum which, in accordance with the First Clause of the said will, should be finally decreed and determined to be the value of the personal property belonging to the said estate at the date of such decree and determination, after the payment and discharge, or provision for the payment and discharge, of all obligations contemplated by the Second Clause of the said will; and it was in the said Third Clause provided that such sum should be paid in cash and if the condition and interests of the estate should not warrant the payment of the entire sum at one time, the Executrix and Executors of the said will should pay the same as rapidly as the income and interests of the said estate should permit, without the sale of any real estate or the sacrifice of any personal property as a means of raising such sum; and it was further provided that the entire sum should be paid within two years from the date of the decease of the Testator:

That by a decree of a Judge of the Circuit Court of the First Circuit, Sitting at Chambers, in Probate, dated August 31, 1900, and duly filed in the said Court, the value of the property, real and personal, belonging to the said estate was adjudicated, and it was ordered and decreed that the value of the personal property belonging to said estate at the date of the said decree was $1,073,225.74, and that the sum of $357,741.91, being a one-third part thereof, should be paid in manner provided by the Third Clause of the said Will to the said Abigail K. Campbell Parker, complainant and respondent herein:

That the complainants are uncertain whether the legacy and bequest to the said Abigail K. Campbell Parker of the sum equivalent to one-third of the personal property of the estate valued as aforesaid at the sum of $1,073,225.74 is properly payable (*a*) out of the cash on hand at the date of the death of the Testator and proceeds of personalty subsequently converted by the Executrix and Executors, or (*b*) out of the cash on hand at the date of the death of the Testator and proceeds of personalty subsequently converted, as well as the net income from the realty and personalty of the estate until payment of the said legacy or bequest or either of them:

2nd. That it was provided in and by the Fourth Clause of the said will that the Testator's wife and unmarried children should have and enjoy the free use and occupation of his residence-hou-e-

and grounds at Emma Street and Leahi, Honolulu aforesaid,
6 and that the Executrix and Executors of the said will, or the Trustees, as the case might be, should maintain the residence-houses and grounds of the Testator in suitable condition and repair at the charge of his estate during the life of his wife, Abigail K. Campbell Parker, complainant and respondent herein, and thereafter while all of his then living children should be entitled to reside therein; that the cost of maintaining and repairing the said residences since the death of the Testator has amounted to the sum of $46,000, or thereabouts, and that the same has been paid by the complainants as such Executrix and Executors:

That the complainants are uncertain as to whether the said sum should be charged against the principal of the personalty of the estate or the income thereof, or against the realty of the said estate, or the income thereof:

3rd. That in and by the Fifth Clause of the said will, it was provided that the Executrix and Executors should pay to the said Abigail K. Campbell Parker for the use of herself and the other respondents, being children of the Testator, as a "Family Allowance" such sum monthly as might from time to time be approved and decreed by the Court having jurisdiction of the probate of the said will; and that the Trustees of the said will, from and after their entry upon their functions of trust under the said will, should make such further provision for the maintenance of said children as in the said will thereafter directed:

That by decree of the Judge of the Circuit Court of the First Circuit, Sitting at Chambers, in Probate, dated June 22, 1900, the complainants, Executrix and Executors as aforesaid, were directed to pay to said Abigail K. Campbell Parker as such "Family Allowance" a sum not exceeding $1500, per month from the 21st day of April, 1900, until the further order of the said Court; that the
Executrix and Executors did pay to the said Abigail K.
7 Campbell Parker the said monthly allowance of $1500, from the 21st day of April, 1900, until the third day of July, 1905, when they were discharged as aforesaid; that the said sums so paid to the said Abigail K. Campbell Parker amount in the aggregate to the sum of $93,000.00.

That the complainants are uncertain (*a*) whether the said sum of $93,000.xx/100 should be charged against the principal of the personalty of the said estate or against the income thereof, or against the income of the realty or against all of those three funds or any two of them; and (*b*) whether, under the provisions of the said Clause, the said Abigail K. Campbell Parker is entitled after the discharge of the Executrix and Executors as aforesaid, to the payment of any sum by way of "Family Allowance" for the use of herself and her children, or whether such "Family Allowance" ceased upon the discharge of the Executrix and Executors as aforesaid:

4th. That in the conduct and management of the said estate, the Executrix and Executors of the said will have paid considerable sums of money aggregating $85,000, or thereabouts, being expenses in connection with the realty of the said estate, such as Executors'

commissions on the income from realty, insurance, taxes, water-rates, alterations to buildings other than homesteads and so forth; that the complainants are uncertain whether such sums or any of them should be charged against the principal of the personalty of the said estate or against the income thereof, or against the income of the realty of the said estate:

5th. That it was provided in and by the Ninth Clause of the said will that from and out of the net income, rents, issues and profits of and from the realty belonging to the Estate, the complainants should pay the equal one-third part or portion thereof to the
8 complainant and respondent Abigail K. Campbell Parker for and during the term of her natural life; and in and by the Tenth Clause of the said will it was provided that the remaining two-thirds of the net income, rents, issues, and profits of and from said realty, during the natural life of the complainant and respondent Abigail K. Campbell Parker, and, after her death, the entire net sum thereof should be by the complainants, or their successors in trust, included in one fund with the net income and revenue of and from all the personalty of the estate which should be under their control by virtue of the said will, and that such fund should be by them at stated intervals of not more than six months divided into as many equal parts as there should be then *in esse* any of the children of the Testator by the said Abi*h*ail K. Campbell Parker and should be paid by the complainants to the said children from and after their respective majority or marriage, share and share alike, with the proviso, however, that during the minority of said children respectively and while they should remain unmarried, within such minority, the complainants should provide them or her, being so minor and unmarried, with suitable maintenance and education and funds for foreign travel, in so far as the same should be suitable and desirable to their means and condition, and that all sums expended under that proviso should be charged to "Family Maintenance" and that no part thereof should be charged to said children or any of them individually; and it was further provided that any surplus arising or remaining under the provisions of said Tenth Clause should become a part of the principal of the estate and should be invested and re-invested as such:

That prior to the discharge of the Executrix and Executors, as aforesaid, the said Abigail K. Campbell Parker has expended (over and above the said sum of $1500. per month paid to her by way of "Family Allowance" for the use of herself and her chil-
9 dren) the sum of $3197.15 for the travelling expenses and maintenance of her children, four of the respondents, while on a tour from Honolulu to California during the year 1900 and the sum of $548.80 for the maintenance and education and expenses of foreign travel of one of her said children, to wit, the respondent, Muriel K. Campbell, such sums aggregating in all the sum of $3745.95, and claims that such sum of $3745.95 constitutes a proper charge against said estate and should be paid to her by the complainants herein, Trustees as aforesaid:

That the complainants are uncertain (*a*) whether the said sum of

$3745.95 or any portion thereof is a proper charge against the said estate and should be paid by them as Trustees of said estate, or whether the same should have been paid by the said Abigail K. Campbell Parker out of the said sum of $1500. per month paid to her as aforesaid; and (*b*) whether the sums expended by the Complainants as Trustees by way of "Family Maintenance" are properly payable out of the balance of the income of the estate after deducting the said Abigail K. Campbell Parker's one-third part of the net income of the realty of the estate, or out of the income of the estate before deducting the said Abigail K. Campbell Parker's one-third part of the net income of the realty:

That the complainants are also uncertain whether under the provisions of the ninth clause of the said will the respondent Abigail K. Campbell Parker is entitled to any share of the income of the realty of the estate, pending the close of the administration and whether under the provisions of said Tenth Clause of the said will, the children of the Testator are entitled to any share of the income of the estate pending the closing of the administration of the estate by the Executrix and Executors: and whether or not a share of the income of the estate vests in any of them, during the minority or being minors before marriage; and whether, if it so vest, such share vests absolutely (the payment thereof only being deferred until they reach majority or marry) or contingently upon their reaching majority or marrying:

W. R. S.

10. That the complainants, having taken upon themselves the Execution of the said will, are desirous faithfully to perform their duties in relation thereto, but are advised by counsel that they cannot with safety to themselves and the rights and interests of the respondents proceed in the execution of the said will and of the trust thereby created without the advice and protection of this Court in giving a construction to the several clauses and provisions of said will set forth in paragraph 9 of this their petition, and in respect of which have arisen such doubts and uncertainties.

Wherefore, complainants pray:

1. That the process of this Honorable Court do issue citing the respondents and each of them to appear and due answer made to this petition:

2. That an adjudication be made by this Honorable Court as to the several matters in respect to which said doubts and uncertainties have arisen and a decree settling the construction of said will and directing the complainants in what manner they shall carry the trusts thereof into execution, so as to enable them to execute said trusts properly and with safety to themselves; and

3. For such other further and general relief as complainant may be entitled to in the premises and to this Court may seem meet.

(Signed) ABIGAIL K. CAMPBELL PARKER
(Signed) J. O. CARTER, *Trustee.*
(Signed) CECIL BROWN.

Dated Aug. 1st, 1905.

(Signed) HOLMES & STANLEY,
Attorneys for Complainants.

11 HONOLULU, ISLAND OF OAHU,
Territory of Hawaii:

Cecil Brown being duly sworn upon oath deposes and says that he is one of the complainants named in the foregoing petition; that he has read the same and knows the contents thereof; and that he makes this deposition on behalf of himself and the other complainants named in said petition and that all the matters and things therein stated and set forth are true.

(Signed) CECIL BROWN.

Subscribed and sworn to before me this 1st day of August 1905.

(Signed) H. C. CARTER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[NOTARIAL SEAL.]

12 THIS IS THE LAST WILL AND TESTAMENT of me, JAMES CAMPBELL, of Honolulu in the Hawaiian Islands. Knowing the uncertainty of life, and wishing to make provision for the disposition of my estate, in the event of my death, I do will and direct as follows:

FIRST: My Executrix and Executors, hereinafter named, are directed to reduce to possession all and singular my estate, real personal, and mixed, wheresoever situated; and to manage, control care for and collect the income and revenue thereof, pending the distribution thereof as hereinafter provided; to catalogue, inventory and appraise the same, and to secure an adjudication, by the Court of the Hawaiian Islands having jurisdiction of such matters, of the value thereof. As the interests of my wife, and of my children, concerning such valuation, may conflict, it is my will that each of said interests be fully represented in the proceedings for the determination of the value of my Estate.

SECOND: I direct my said Executrix and Executors to pay and discharge all debts which shall be outstanding against me or my Estate, including all expenses of my last illness and funeral.

THIRD: To my wife,—Abbie Campbell,—I give, devise and bequeath a sum of money equal and equivalent to a One Third (1/3) proportion of the sum which, in accordance with paragraph numbered FIRST hereof, shall be finally decreed and determined to be the value of the Personal Property only, belonging and pertaining to my estate, at the date of such decree and determination, and after the payment and discharge, or provision for the payment and discharge of all obligations contemplated by paragraph numbered SECOND hereof. Such sum shall be paid in cash, and if the condition and interests of my estate shall not warrant the payment of the entire sum hereby contemplated, at one time, then my Executrix and Executors shall pay the same as rapidly as the income and interests of my estate shall permit, without the sale of any real estate, or the sacrifice of any personal property, as a means of raising such sum, but PROVIDED that the entire sum shall be paid within Two years from the date of my decease, and no de-

13

(s). James Campbell.

ferred payments shall, within said period of Two years, draw any interest. The said sum to be and become the absolute separate property of my said wife, To have and To Hold unto her, her Executors, administrators and assigns forever.

FOURTH: It is my will that my said wife, and our children, namely, Abbie, —Alice, —Muriel and Mary, together with any other child or children that shall be born to us, shall, during the life of my said wife, have and enjoy the free use and occupation of my residence-houses and grounds at Emma Street, and at Leahi, in said Honolulu; together with all and singular the furniture and fittings therein; the outhouses thereon; and the horses, carriages, harness, stock and utensils therewith used or thereto in any wise appertaining, —as and for a place and places of family residence. Each of my children shall continue to enjoy such right of residence, with the incidental rights above-described, while he or she shall remain sole and unmarried, and no longer; and this irrespective of whether my said wife be then living or not. And my Executrix and Executors, or the Trustees appointed hereunder, as the case may be, shall maintain said residences, buildings and grounds in suitable condition and repair, at the charge of my Estate, during the life of my said wife, and thereafter while all of my then living children shall be entitled to reside therein. But when any child, by contracting marriage, shall loose such right of residence, then and
14 thereafter, (my wife being dead,) the expense of such maintenance and repairs shall be borne by those of my said children who shall be entitled to occupy said premises hereunder.

(s). James Campbell.

FIFTH: I direct that my Executrix and Executors do pay to my said wife, for the use of herself and our children, as a family allowance, such sum, monthly, as may from time to time be approved and decreed by the Court having jurisdiction of the Probate of this will. And the Trustees herein provided for, from and after their entry upon their functions of trust hereunder, shall make such further provision for the maintenance of said children as is hereinafter directed.

SIXTH: At and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered respectively SECOND and THIRD hereof, I will and direct that my Executrix and Executors shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate. And I do give, devise and bequeath unto the Trustees hereinafter named, and to those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest, residue and remainder of my Estate, not hereinbefore otherwise given, devised or bequeathed. To HAVE AND TO HOLD unto said Trustees, their respective heirs, executors, administrators, assigns and successors in trust hereunder, forever. BUT IN TRUST NEVERTHELESS, for the uses and purposes hereinafter expressed and set forth, that is to say:—

SEVENTH: With respect to my said residence-houses, and premises, and the personality therein and thereon, as mentioned in paragraph numbered FOURTH, hereof, to permit and suffer the same to be used

and occupied, and to maintain and keep the same in repair,
15 as provided in said paragraph FOURTH, and, at the termination of the free use and occupancy thereof, as therein provided and limited, said property, both real and personal, shall be by my said Trustees, (for the time being,) partitioned among my then surviving children, and the lawful issue of my deceased child, (Raking by representation,) in such manner, and upon such terms and conditions as to payment of owelty and otherwise, as the parties entitled hereunder shall agree. And in case of their failure to agree, within a reasonable time, it shall be the duty of such Trustees to procure a judicial decree to make such partition; and to carry into effect any partition which shall be agreed upon or decreed hereunder, by suitable deed or deeds of conveyance.

EIGHTH: With respect to all property which shall be so distributed to them, other than that mentioned in the last preceding paragraph, I direct my Trustees aforesaid, to reduce it to possession, and to hold, manage, control, preserve and direct it; and to pay all costs and charges thereof, including their own commissions for such administration. And to collect all the rents, issues, profits, income and revenue thereof, and collect and realize upon all credits and securities, at such times, and in such manner, and upon such terms as to them shall seem best,—and to invest and reinvest, and keep invested,—and at will to change the investments of any and all moneys that shall come to their hands by virtue hereof, and which are not otherwise herein specifically bequeathed, assigned or appropriated; and to segregate, and keep separate and apart, (during the life of my wife,) the accounts of and pertaining to the realty of my Estate from the accounts pertaining to any and all other thereof.

(s). James Campbell.

16 NINTH: And from and out of the net income, rents, issues and profits of and from the realty last aforesaid, said Trustees shall pay the equal One Third part or portion thereof, in semi-annual or, (at the discretion of said Trustees,) more frequent payments, to my said wife, for and during the remainder of her natural life. TO HAVE AND TO HOLD the amounts herein provided so to be paid, as and for her absolute and separate property,—unto my said wife, her executors, administrators and assigns forever.

TENTH: And the remaining Two Thirds of the net income, rents, issues and profits of and from said realty, during the natural life of my said wife, and, after her death, the entire net sum thereof, shall be by my said Trustees included in one fund with the net income and revenue of and from all my Estate other than such realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than six months, divided into as many equal parts as there shall be then *in esse* any of my children by my said wife, and shall be by said Trustees paid to my said children, from and after their respective majority or marriage, share and share alike; PROVIDED, that if any of my said children shall decease, leaving lawful issue, such issue shall stand in the place or places of his, her, or their parent or parents in all respects concerning the division, payment and receipt of the fund herein mentioned; and FURTHER PROVIDED that during the minority

of said children respectively, and while they shall respectively remain unmarried, within such majority, said Trustee shall provide him her or them being so minor and unmarried, with suitable maintenance and education, and funds for foreign travel, in so far as the same shall be suitable and desirable to their means and condi-
17 tion; and all sums expended under this provision shall be charged to Family Maintenance, and none of it shall be charged to said children, or any of them individually. And any surplus revenues arising or remaining under the provisions of this paragraph, shall become a part of the principal of my Estate, and shall be invested and reinvested as such. The sums expended for family maintenance hereunder shall not be reckoned as a part of such net income as herein provided.

ELEVENTH: And it is further my will that no beneficiary devisee or legatee under this Will shall have the power or authority to in any wise anticipate any of the rents, issues, profits, income, moneys or payments herein provided to be devoted or paid to him or her, or any part thereof; nor to alienate, convey, transfer or dispose of the same, or of any interest therein or part thereof, in advance of payment, nor shall the same be involuntarily alienated by him or her, or be subject to attachment or execution, or to be levied upon or taken upon any process for any debts which any such beneficiary, devisee or legatee shall have contracted or shall contract; or in satisfaction of any demands or obligations which he or she shall incur. And all payments in the last preceding paragraph authorized and provided for, shall be made, and shall be valid and effectual only when made to the beneficiary, devisee or legatee, in person, to whom the same shall appertain and belong, and upon his or her individual receipt: PROVIDED that when and while the person so entitled to receive such payment shall be without the bounds of the Hawaiian Islands, such payment may be made to any formally appointed agent of such absentee, but then only upon the personal receipt above provided for. AND FURTHER PROVIDED that if,
18 and while any such beneficiary, devisee or legatee shall be for any reason other than minority, subject to judicial guardianship, such payments shall be made to the guardian or guardians of the persons so subject.

(s). James Campbell.

TWELFTH: it being my purpose herein to provide a safe and certain income and maintenance for my wife, our children and grandchildren, for and during the period of the trusts hereby established, I do will and direct that each female beneficiary hereunder shall receive and hold all moneys and other rights and privileges herein provided for, free from the debts and control of any husband she may have after the date of the execution of this will,—and that the Trustees herein named, and their successors in trust hereunder, shall keep intact my Estate, and administer the same under the name of "The Estate of James Campbell",—and that the realty thereof, (except as herein provided in the case of said residence premises) shall be particularly and especially preserved intact, and shall be aliened only in the event, and to the extent, that the obvious interests of my Estate shall so demand.

THIRTEENTH: The authority of my said Trustees hereunder, shall continue during the natural life and lives of my wife, and of my children by my said wife, who shall be *in esse* at the date of my decease, and the survivor of them; and, if there shall be *in esse*, at the death of such survivor, any lawful issue of any such child as last aforesaid, then these trusts, and the authority of said Trustees thereunder, shall further continue for *for* the definite term of Twenty Years after the decease of such survivor, PROVIDED any such lawful issue as aforesaid shall live so long, and if not, then for such lesser term and period as he, she or they shall live.

19 FOURTEENTH: At the end of the period limited in the last preceding paragraph, said Trustees shall partition, or have judicially partitioned all and singular my Estate among and between such lawful issue of my said children as shall then be *in esse*, (each of such issue taking *per stirpes*, and not *per capita*,) and shall carry such partition into effect by adequate instruments of absolute conveyance.

FIFTEENTH: If, at the death of the survivor of my said wife and children, there shall be living no lawful issue of any of said children, then, and in that event, I direct my Trustees, by adequate instruments of absolute conveyance, to convey all and singular my Estate to my right heirs, as soon as their identity shall be finally established, and in the proportions to which Hawaiian law shall entitle them respectively.

(s.) James Campbell.

SIXTEENTH: The provision herein made for my wife is intended, and shall be by her accepted, (if at all,) in lieu and full satisfaction of her dower interest in my Estate. The word "issue" as used herein, is intended to mean, and signifies, all persons lawfully descended from any of my said children as a common ancestor.

SEVENTEENTH: I direct that my Trustees shall furnish to each beneficiary, devisee and legatee hereunder, during the month of January in each year, a complete and detailed account and statement of the receipts, expenditures, transactions, assets and liabilities of my said Estate, for the preceding year, which shall be known as their Annual Report. A copy of such Report shall be filed with the Hawaiian Court having probate jurisdiction, and such account shall be subject to approval, modification or surcharge by such Court, upon legal notice to all concerned.

20 EIGHTEENTH: I hereby nominate and appoint my said wife, Abbie Campbell, as Executrix, and Joseph O. Carter, the elder, and Cecil Brown, both of said Honolulu, as Executors of this my last Will and Testament; and I further nominate and appoint my said wife, and said Joseph O. Carter, the elder and Cecil Brown, to be and act as Trustees of my said Estate, as hereinbefore provided. And I will and direct that if, for any reason, one or more of said persons so nominated shall be unable or shall decline to assume or to continue the relation of such Executrix, Executor or Trustee, his or her place as such officer shall be filled as follows; namely:—If only one of said nominees shall be willing to so act, or if, for any reason, their number, as such officers, shall be reduced to one, the one so willing to act or acting, shall nominate to the Hawaiian Court having probate jurisdiction, some other suitable

person to act as such Executrix, Executor or Trustee, as the case may be. If such nomination shall be confirmed by the Court, and such nominee shall duly qualify, then the remaining vacancy shall be filled by a joint nomination of the two persons so qualified, and confirmation by the Court. And where there shall exist but one such vacancy, both of the persons then willing to act or acting, shall join in any nomination to fill the same;—and, in like manner any and all successive vacancies shall be filled, by such nominations and confirmations.

NINETEENTH: I will and direct that bonds shall be required of all persons who shall be appointed and confirmed as Executrices, Executors or Trustees hereunder, but only in such sum as shall equal the prospective annual income of my said Estate for the year next succeeding the date of fixing the amount of such bonds.

21 TWENTIETH: The concurrence of any two of my Executrix, Executors and Trustees, appointed in compliance with the provisions of this Will, shall suffice for any act herein authorized. If one Executrix, Executor or Trustee shall dissent from the others in regard to any considerable transaction, or respecting the general course pursued by the majority, it shall be the duty of such dissentient to state the reasons for his or her dissent in the final Report of the Executrix and Executors, or in the next Annual Report of the Trustees, as the case may be.

TWENTY-FIRST: Any and all Wills and Testaments by me at any time or times heretofore made or executed, is and are hereby revoked, annulled and cancelled.

TWENTY-SECOND: I will and direct that no person who shall in good faith pay money to my Executrix, Executors or Trustees hereunder, in discharge or on account of any valid obligation to my estate, nor any purchaser from said Executrix, Executors or Trustees, of any real or personal property of my Estate in manner authorized by this Will, shall be in anywise responsible for the application or misapplication by said Executrix, Executors or Trustees of the money so paid, or of the proceeds of the purchase or sale of such property.

(s.) James Campbell.

IN TESTIMONY WHEREOF, I have inscribed my name in the margin of each of the ten (10) pages of this my Last Will and Testament preceding this page, which said pages are typewritten, and each consisting of twenty-nine numbered lines,—and I have also subscribed my name to the whole, on this present page, being page number eleven (11) hereof, and have published and declared, and do hereby publish and declare This Instrument as and for my Last will and Testament, at the City and County of San Fran-

22 cisco, in the State of California, this Eighth day of July, in the year of our Lord, One Thousand, Eight Hundred and Ninety-Six.

(S.) JAMES CAMPBELL.

On this Eighth day of July, in the year One Thousand, Eight Hundred and Ninety-Six, at the City and County of San Francisco, in the State of California, in the presence of the undersigned, and each of us, the above named James Campbell, of Honolulu, Hawaiian

Islands, (he being well known to each of us,) did inscribe his name in the margin of each of the ten (10) pages of this Instrument which precede this present page; and did, in our and each of our presence, subscribe his name to said instrument, on this present page; and did, in the presence and hearing of us, and each of us, publish and declare the said Instrument as and for his Last Will and Testament. Wherefore we, at the City and County aforesaid, and upon the date last aforesaid, at the request of said James Campbell, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses of the inscription, subscription, publication, declaration and request aforesaid.

(S.) F. WUNDENBERG.
(S.) CHAS. T. WILDER.
(S.) CLARENCE W. ASHFORD.

23 [Endorsed:] Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, Complainants *vs.* Abigail K. Campbell Parker, *et al.*, Respondents. Petition. Holmes & Stanley, Kaahumanu Street. Attorneys for Complainants.

24 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Answer of Abigail K. Campbell Parker.

The answer of Abigail K. Campbell Parker, one of the respondents in the above entitled cause, to the petition of the said Trustees under the Will of James Campbell, deceased, respectfully shows as follows:

That this respondent admits all the allegations set forth in said petition to be true, except the allegation that the sum of $3197.15 was expended by her for the travelling expenses and maintenance of her children, being four of the respondents, while on a tour from Honolulu to California during the year 1900; and in this respect this respondent alleges the truth to be that said sum was expended by this respondent for the travelling expenses and maintenance of two of her children while on said trip.

[Endorsed:] (Sgd.) H. C. C.

25 That this respondent contends and claims that the bequest contained in the third clause of said Will of a sum of money equal and equivalent to a one-third proportion of the sum which should be determined to be the value of the personal property of said Estate, after the payment and discharge of the obligations mentioned in the second clause of said Will, should be paid from and out of the cash on hand and proceeds of personalty subsequently converted by the Executrix and Executors, and, or the income from personalty other than that portion thereof so bequeathed to this respondent as aforesaid, and not from the income from any realty of said Estate.

That this respondent contends and claims that the moneys expended in the maintenance and repair of the residences at Emma Street and Leahi, Honolulu, amounting to the sum of $46,000, or thereabouts, under the fourth clause of said Will, should be paid from and out of the gross income derived from the realty of said Estate, and should not be charged against the principal or income of the personalty nor against the realty.

That this respondent contends and claims that the sum of $93,000 paid by said Executrix and Executors to this respondent as and for "Family Allowance" for herself and children under the fifth clause of said Will, should be paid from and out of the income derived from the personalty of said Estate other than the portion thereof bequeathed to this respondent in and by the third clause of said Will.

That this respondent contends and claims that the authority of said complainants as Executrix and Executors of said Will to pay to this respondent any moneys as and for such "Family Allowance," ceased upon their discharge on the 3rd day of July, 1905,

[Endorsed:] (Sgd.) H. C. C.

26 and that it is now the duty of said complainants as Trustees under said will to obtain an order of court, authorizing them as such Trustees to pay from and out of the income of the realty and personalty of said Estate, other than such thereof as was bequeathed by said testator to this respondent, and after the payment of her portion to her, such further moneys as may be necessary for such maintenance, education and foreign travel as may be suitable and desirable of and for said children being minor and unmarried.

That this respondent contends and claims that the expenses incurred by said Executrix and Executors in connection with the realty of said Estate, such as commissions on income from realty, insurance, taxes, water-rates and alterations to buildings, amounting to $85,000, or thereabouts should be charged against and paid out of the income of the realty of said Estate.

That as to said sum of $3197.15 and $584.80 paid out for the maintenance, education and travel of said children as alleged in said petition, this respondent alleges that the expenditure of same was necessary, suitable and desirable to their means and condition; that the regular allowance of $1500 per month for such expenses

was inadequate during the tour referred to; that said expenditures were approved by the said Executors and have heretofore been passed and allowed by this Court in Probate in the approval of the accounts of said Executrix and Executors; and this respondent contends and claims that the expenditure thereof should be allowed as a charge against the said Estate and that said sums should be paid to her by said Trustees from and out of the income from the realty

[Endorsed:] Sgd.) H. C. C.

27 and personalty of said Estate, other than such thereof as was bequeathed by said testator to this respondent and after the payment of her portion to her.

That this respondent contends and claims that the true meaning an- intent and the proper construction of the tenth clause of said Will are that the respective interests of said children in and to the property therein and thereby vested in said Trustee for the benefit of said children, are not absolutely vested in them or any of them, but are contingent upon the event of marriage or reaching majority.

And further answering said petition, this respondent alleges, contends and claims that the true intent and purpose of said testator as expressed in and by his said Will, was, that this respondent should take and have under said Will an absolute property in and to a sum equal to one-third of the value of the personal property of said Estate after the payment and discharge or provision for the payment and discharge of his debts, including the expenses of his last illness and funeral; also one-third of the net income, rents, issues and profits from the realty, after the payment of the costs and charges of the management, control and preservation thereof and the repair of said residences at Emma Street and Leahi, for and during the term of her natural life; also the right of occupancy of said residences during her natural life; and also an allowance for her support during the administration of said Estate by the Executrix and Executors.

Wherefore, this respondent prays that this Court may, by its decree herein, settle the construction of said Will in accordance with the claims and contentions of this respondent as herein set forth; that her said claims and contentions be approved and allowed; that said complainants be instructed accordingly; for costs and such other and further relief as may be just.

(Signed) ABIGAIL K. CAMPBELL PARKER.

Dated, Honolulu, August 29th, 1905.

[Endorsed:] (Sgd.) H. C. C.

28 (Signed) A. G. M. ROBERTSON,
Attorney for Respondent.

TERRITORY OF HAWAII,
Island of Oahu, ss:

Personally appeared Abigail K. Campbell Parker, who, being duly sworn, deposes and says that she is the respondent named in the fore-

going answer; that she has read said answer; knows its contents and that the same are true.

(Signed) ABIGAIL K. CAMPBELL PARKER.

Subscribed and sworn to before me this 29th day of August, A. D. 1905.

[NOTARIAL SEAL.] (Signed) H. C. CARTER,
Notary Public, First Judicial Circuit.

(Endorsed:) E. 1488. Reg. 1/223. Circuit Court First Circuit. In Equity. Abigail K. Campbell Parker *et al.* Trustees, *v.* Abigail K. Campbell-Parker, *et al.* Answer of Abigail K. Campbell-Parker. Filed Aug. 30, 1905 at 9:50 A. M. George Lucas, Clerk. A. G. M. Robertson, Att'y for A. K. Campbell-Parker.

29 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Bill for Construction of Will.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Answer of Respondent Alice K. Macfarlane.

Now comes Alice K. Macfarlane respondent above named and for answer to complainants' bill in the above entitled suit says as follows, to-wit:

I.

Said respondent admits all, and each of the allegations of fact contained in said bill; and, as to the construction of the will referred to therein, contends and makes claims as hereinafter set forth.

II.

As to clause numbered "1st" of paragraph numbered "9" of said bill, said respondent contends and claims, that the legacy and bequest to respondent Abigail K. Campbell Parker, mentioned in said paragraph "9" may and should be paid either (*a*) out of the cash on hand at the date of the death of the testator and the income from personalty; or (*b*) in case said cash on hand and said income are insufficient, then out of said cash on hand and said income together with proceeds of personalty converted by the executrix and executors; that the income from so much of said legacy and bequest to Abigail K. Campbell Parker as shall remain un-
30

paid during the period of two years from and after the death of the testator, shall belong to the corpus of the estate and may be used with other income and assets aforesaid to pay said legacy and bequest, but that the income from so much of said legacy and bequest as remains unpaid after said period of two years shall belong to said respondent Abigail K. Campbell Parker.

III.

As to clause numbered "2nd" of said paragraph "9" said respondent Alice K. Macfarlane contends and claims that the sum of $46,000 expended in maintenance and repairs of the Emma street and Leahi residences should be paid out of the gross income from the realty of the testator's estate.

IV.

As to clause numbered "3rd" of said paragraph "9" said respondent contends and claims that the sum of $93,000 paid for family allowance for said Abigail K. Campbell Parker and her children should be paid out of income from the personalty; and that the authority of the executrix and executors to pay said Abigail K. Campbell Parker any family allowance ceased upon their discharge, to-wit, on July 3, A. D. 1905, and that further allowance for said purpose may be had only under and in accordance with the provisions of clause numbered "tenth" of said will.

V.

As to clause numbered "4th" of said paragraph "9" said respondent Alice K. Macfarlane contends and claims that the expenses amounting to $85,000, incurred in connection with the realty of said estate should be charged against the income of the realty.

31 VI.

As to clause numbered "5th" of said paragraph "9" said respondent contends and claims:

(*a*) That the sum of $3197.15 and $548.80 representing expenses for maintenance, education and travel of the testator's children over and above the monthly allowance of $1500 are not proper charges against said estate; that under said will said expenses may be paid only out of said allowance of $1500 per month;

(*b*) That the sums expended by the complainants as trustees that is to say, under clause numbered "tenth" of said will, by way of family maintenance are properly payable out of the balance of the income of the estate after deducting the said Abigail K. Campbell Parker's one-third part of the net income of the realty of said estate.

(*c*) And said respondent Alice K. Macfarlane contends and claims that she is entitled to a share of the income of said estate pending the closing of the administration thereof and from and after the death of the testator;

(*d*) And said respondent Alice K. Macfarlane contends and claims that the shares of the income of said estate provided for the

children of the testator by clause numbered "tenth" of said will do not vest absolutely in said minors but that the vesting of said interests, and each of them is contingent upon marriage or attainment of majority in the case of each of said children.

Wherefore the respondent Alice K. Macfarlane prays that this Court by its decree herein do settle the construction of said will in accordance with the claims and contentions of this respondent as hereinabove set forth; and that said respondent's claims and contentions aforesaid be approved, confirmed and allowed; and
32 that the complainants herein be instructed accordingly; and said respondent prays that she be allowed her costs incurred herein and prays for such other, different and further relief as may be just and as the premises may require.

Honolulu, September 18, A. D. 1905.

(Signed) ALICE K. MACFARLANE,
By THOMPSON & CLEMONS,
Her Attorneys.

TERRITORY OF HAWAII,
Honolulu, County of Oahu, ss:

Frank E. Thompson, being duly sworn, on oath deposes and says: That he is one of the attorneys for the above named respondent Alice K. Macfarlane, and as such attorney is authorized to make this verification on her behalf; that he has read and knows the contents of the foregoing answer, and that the same is true.

(Signed) FRANK E. THOMPSON.

Subscribed and sworn to before me this 18th day of September, A. D. 1905.

(Signed) CHAS. F. CLEMONS,
Notary Public, District of Honolulu, First Judicial Circuit, Territory of Hawaii.

[NOTARIAL SEAL.]

Endorsed: Eq. 1488. Circuit Court First Judicial Circuit. Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell Parker *et al.* Trustees *v.* Abigail K. Campbell Parker *et al.* Answer of Respondent Alice K. Macfarlane. Reg. 1 223. Filed Sept. 18, 1905 at 2:10 P. M. J. A. Thompson, Clerk. Thompson & Clemons Attorneys for Respondent Alice K. Macfarlane.

33 In the Circuit Court of the First Circuit, Territory of Hawaii. at Chambers. In Probate.

Bill for Construction of Will.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Answer of Abigail Helen Kapiolani Kawananakoa, a Minor; David Kalakaua Kawananakoa, a Minor; and —— Kawananakoa, a Minor; by J. J. Dunne, Esq., their Guardian Ad Litem.

To the Honorable John T. Debolt, First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, or other The Judge of the said Court, presiding at Chambers.

The joint answer of Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, and —— Kawananakoa, a Minor, three of the respondents above named, by J. J. Dunne, Esq., their Guardian *Ad Litem*, to the bill of complaint of the above named complainants filed herein for a construction of the will of said James Campbell, deceased.

Said respondents, saving and reserving to themselves now, and at all times hereafter, all and all manner of benefit and advantage of exception, or otherwise, which can be had or taken to the said complainants' said bill of complaint, or to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as these respondents are advised is in any-
34 wise necessary or material for them to make answer unto, saith:

1. These respondents show that, in the above entitled cause by an order of a Judge of the Circuit Court of the First Circuit sitting at Chambers in Probate dated September 1, 1905, and duly filed in said Court, J. J. Dunne, Esq., was duly and regularly appointed their Guardian *Ad Litem* herein, and ever since has been and is now such Guardian *Ad Litem*.

2. These respondents admit all of the allegations contained in paragraph 1 of said bill of complaint.

3. These respondents admit all of the allegations contained in paragraph 2 of said bill of complaint.

4. These respondents admit all of the allegations contained in paragraph 3 of said bill of complaint, save and except the allega-

tions in said paragraph contained to the effect that the complainants herein as executrix and executors respectively of the will of said James Campbell, deceased, have paid all legacies provided for by said will; and as to said last mentioned allegations, these respondents neither admit nor deny the same, but leave said complainants to their proof thereof.

5. These respondents admit all of the allegations of paragraph 4 of said bill of complaint.

6. These respondents admit all of the allegations of paragraph 5 of said bill of complaint.

7. These respondents admit all of the allegations of paragraph 6 of said bill of complaint.

8. And answering as to the allegations contained in paragraph 7 of said bill of complaint, these respondents neither admit nor deny the same, but leave said complainants to their proof thereof.

9. And answering as to the allegations contained in paragraph 8 of said bill of complaint, these respondents neither admit nor deny the same, but leave said complainants to their proof thereof.

35 10. And answering as to the allegations contained in subdivision 1st of paragraph 9 of said bill of complaint, these respondents admit that by a decree of a judge of the Circuit Court of the First Circuit sitting at Chambers in Probate, dated September 21, 1900, and duly filed in said Court, the value of the property, real and personal, belonging to the estate of said James Campbell, deceased, was adjudicated, and it was ordered and decreed that the value of the personal property only belonging and pertaining to the said estate at the date of said decree was $1,073,225.74, and that the sum of $357,741.91 being a sum of money equal and equivalent to a one-third proportion of the sum finally decreed and determined to be the value of the personal property only J. J. D. belonging and pertaining to the estate of the deceased, should be paid in manner provided by the will of the deceased to the said Abigail K. Campbell Parker, complainant and respondent herein, as her provision under paragraph "Third" of the will of the deceased; but as to all of the other allegations contained in said subdivision 1st of said paragraph 9 of said bill of complaint, these respondents neither admit nor deny the same, but leave said complainants to their proof thereof.

11. And answering so to the allegations contained in subdivision 2nd of paragraph 9 of said bill of complaint, these respondents admit that the cost of maintaining and repairing the residences in said paragraph mentioned, since the death of the testator, has amounted to the sum of $16,000., or thereabouts, and that the same has been paid by the complainants as such executrix and executors; but as to all of the other allegations contained in said subdivision 2nd of said paragraph 9 of said bill of complaint, these respondents neither admit nor deny the same, but leave said complainants to their proof thereof.

36 12. And answering as to the allegations contained in subdivision 3rd of paragraph 9 of said bill of complaint, these respondents admit by a decree of the Judge of the Circuit Court of

the First Circuit sitting at Chambers in Probate, dated June 22, 1900, the complainants, executrix and executors as aforesaid, were directed to pay to said Abigail K. Campbell Parker as "Family Allowance" a sum not exceeding $1500. per month from the 21st day of April, 1900, until the further order of the said Court; that the executrix and executors did pay the said Abigail K. Campbell Parker the said monthly allowance of $1500. from the 21st day of April 1900 until the third day of July, 1905, when they were discharged as in said bill of complaint alleged and that the said sums so paid to the said Abigail K. Campbell Parker amount in the aggregate to the sum of $93,000; but as to all of the other allegations contained in subdivision 3rd of said paragraph 9 of said bill of complaint, these respondents neither admit nor deny the same, but leave said complainants to their proof thereof.

13. And answering as to the allegations contained in the 4th subdivision of paragraph 9 of said bill of complaint, these respondents admit that in the conduct and management of the said estate, the said executrix and executors of the said will have paid considerable sums of money aggregating $5,000., or thereabouts, being expenses in connection with the realty of the said estate, such as executors' commissions on the income from realty, insurance, taxes, water-rates, alterations to buildings other than homesteads and so forth; but as to all other allegations in said subdivision 4th of said paragraph 9 of said bill of complaint, these respondents neither admit nor deny the same, but leave said complainants to their proof thereof.

14. And answering as to the allegations contained in subdivision 5th of paragraph 9 of said bill of complaint, these respon-
37 dents admit that prior to the discharge of the executrix and executors, as in said bill of complaint alleged, the said Abigail K. Campbell Parker has expended (over and above the said sum of $1500. per month paid to her by way of "Family Allowance" for the use of herself and her children) the sum of $3197.15 for the travelling expenses and maintenance of her children, while on a tour from Honolulu to California during the year 1900, and the sum of $548.80 for the maintenance and education and expenses of foreign travel of one of her said children, to wit, the respondent, Muriel K. Campbell, such sums aggregating in all in the sum of $3745.95; but as to all of the other allegations in said subdivision 5th of said paragraph 9 of the said bill of complaint, these respondents neither admit nor deny the same, but leave said complainants to their proof thereof.

Wherefore, having fully answered herein, these respondents pray, and each of them prays, that their, and each of their, rights and interests in all matters and things in question in this cause shall receive the protection of this Court; that, as prayed for by the complainants herein, this Court make and give its decree settling the construction of said will and directing the complainants in what manner they shall carry the trusts thereof into execution, so as to enable them to execute said trusts properly and with safety to themselves, and to these respondents, and to each of them; that such decree be given and made herein by this Court as may be adequate

for the full protection of all the rights and interests of these respondents, and each of them; that these respondents, and each of them, may have such other and further relief herein as to this Court shall seem meet and proper, and as the nature and justice of this cause may require; and that these respondents and each of
38 them may have their reasonable costs and disbursements herein necessarily incurred.

And as in duty bound, these respondents will ever respectfully so pray.

ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor.
DAVID KALAKAUA KAWANANAKOA, a Minor, and
—— KAWANANAKOA, a Minor.
Respondents,

(Signed) By J. J. DUNNE,
Their Guardian Ad Litem.

(Signed) J. J. DUNNE,
Solicitor for said Minors.

HONOLULU, ISLAND OF OAHU,
Territory of Hawaii, ss:

J. J. Dunne, being duly sworn upon oath deposes and says that he is the Guardian *Ad Litem* named in the foregoing answer; that he has read the same and that all of the matters and things therein stated and set forth are true.

(Signed) J. P. DUNNE.

Subscribed and sworn to before me this 22nd day of September, A. D. 1905.

(Signed) ANTONE MANUEL,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[NOTARIAL SEAL.]

Due service of the foregoing Answer and receipt of a Copy thereof, are hereby admitted, this Friday, the 22nd day of September, A. D. 1905.

(Signed) HOLMES & STANLEY,
Solicitors for Complainants.

Endorsed: Reg. 1 223, E. 1488. Circuit Court First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell-Parker *et al.*, Complainants, *vs.* Abigail K. Campbell Parker, *et al.*, Repondents. Answer of certain Minors by their Guardian *Ad Litem*. Filed Sept. 22, 1905 at 10:25 A. M. George Lucas, Clerk. J. J. Dunne, Honolulu, Hawaii, Solicitor for said Minors.

In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Bill for Construction of Will.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Answer of Abigail W. Kawananakoa, One of the Above Named Respondents.

To the Honorable John T. Debolt, First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, or other The Judge of the said Court, presiding at Chambers.

The answer of Abigail W. Kawananakoa, a married woman, wife of David Kawananakoa, eldest daughter of the above named James Campbell, deceased, and one of the respondents above named, to the bill of complaint of the above named complainants filed herein for a construction of the will of said James Campbell, deceased.

Said respondent, saving and reserving to herself now, and at all times hereafter, all and all manner of benefit and advantage of exception, or otherwise, which can be had or taken to the said complainants' said bill of complaint, or to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as this respondent is advised is in anywise necessary or material for her to make answer unto, saith:

1. This respondent admits all of the allegations contained in paragraph 1 of said bill of complaint.

2. This respondent admits all of the allegations contained in paragraph 2 of said bill — complaint.

3. This respondent admits all of the allegations contained in paragraph 3 of said bill of complaint, save and except the allegation in said paragraph contained to the effect that the complainants herein as executrix and executors respectively of the will of said James Campbell, deceased, have paid all legacies provided for by said will; and as to said last mentioned allegation, this respondent neither admits nor denies the same, but leaves said complainants to their proof thereof.

4. This respondent admits all of the allegations of paragraph 4 of said bill of complaint.

5. This respondent admits all of the allegations of paragraph 5 of said bill of complaint.

6. This respondent admits all of the allegations of paragraph 6 of said bill of complaint.

7. And answering as to the allegations contained in paragraph 7 of said bill of complaint, this respondent neither admits nor denies the same, but leaves said complainants to their proof thereof.

8. And answering as to the allegations contained in paragraph 8 of said bill of complaint, this respondent neither admits nor denies the same, but leaves said complainants to their proof thereof.

9. And answering as to the allegations contained in sub-
41 division 1st of paragraph 9 of said bill of complaint, this respondent admits that by a decree of a judge of the Circuit Court of the First Circuit sitting at Chambers in Probate, dated September 21, 1900, and duly filed in said Court, the value of the property, real and personal, belonging to the estate of said James Campbell, deceased, was adjudicated, and it was ordered and decreed that the value of the personal property only belonging and pertaining to the said estate at the date of said decree was $1,073,225.74, and that the sum of $357,741.91, being a sum of money equal and equivalent to a one-third proportion of the sum finally decreed and determined to be the value of the per- J. J. D.
sonal property only belonging and pertaining to the estate of the deceased, should be paid in manner provided by the will of the deceased to the said Abigail K. Campbell Parker, complainant and respondent herein, as her provision under paragraph "Third" of the will of the deceased; but as to all of the other allegations contained in said subdivision 1st, of said paragraph 9 of said bill of complaint, this respondent neither admits nor denies the same, but leaves said complainants to their proof thereof.

10. And answering as to the allegations contained in subdivision 2nd, of paragraph 9 of said bill of complaint, this respondent admits that the cost of maintaining and repairing the residences in said paragraph mentioned, since the death of the testator, has amounted to the sum of $46,000, or thereabouts, and that the same has been paid by the complainants as such executrix and executors; but as to all of the other allegations contained in said subdivision 2nd, of said paragraph 9 of said bill of complaint, this respondent neither admits nor denies the same, but leaves said complainants to their proof thereof.

11. And answering as to the allegations contained in sub-
42 division 3rd, of paragraph 9 of said bill of complaint, this respondent admits by a decree of the Judge of the Circuit Court of the First Circuit sitting at Chambers in Probate, dated June 22, 1900, the complainants, executrix and executors as aforesaid, were directed to pay to said Abigail K. Campbell Parker as "Family Allowance" a sum not exceeding $1500 per month from the 21st day of April, 1900, until the further order of the said Court; that the executrix and executors did pay the said Abigail K. Campbell Parker the said monthly allowance of $1500 from the 21st day of April, 1900, until the third day of July, 1905, when they were discharged as in said bill of complaint alleged and that the said sums

so paid to the said Abigail K. Campbell Parker amount in the aggregate to the sum of $93,000; but as to all of the other allegations contained in said subdivision 3rd. of said paragraph 9 of said bill of complaint, this respondent neither admits nor denies the same, but leaves said complainants to their proof thereof.

12. And answering as to the allegations contained in the 4th subdivision of paragraph 9 of said bill of complaint, this respondent admits that in the conduct and management of the said estate, the said executrix and executors of the said will have paid considerable sums of money aggregating $85,000., or thereabouts, being expenses in connection with the realty of the said estate, such as executor's commissions on the income from realty, insurance, taxes, water-rates, alterations to buildings other than homesteads and so forth; but as to all other allegations in said subdivision 4th of said paragraph 9 of said bill of complaint, this respondent neither admits nor denies the same, but leaves said complainants to their proof thereof.

13. And answering as to the allegations contained in subdivision 5th of paragraph 9 of said bill of complaint, this respondent admits that prior to the discharge of the executrix and executors, as
43 in said bill of complaint alleged, the said Abigail K. Campbell Parker has expended (over and above the said sum of $1500. per month paid to her by way of "Family Allowance" for the use of herself and her children) the sum of $3197.15 for the travelling expenses and maintenance of her children, while on a tour from Honolulu to California during the year 1900, and the sum of $548.80 for the maintenance and education and expenses of foreign travel of one of her said children, to wit, the respondent, Muriel K. Campbell, such sums aggregating in all in the sum of $3745.95; but as to all of the other allegations in said subdivision 5th of said paragraph 9 of the said bill of complaint, this respondent neither admits nor denies the same, but leaves said complainants to their proof thereof.

Wherefore, having fully answered herein, this respondent prays that her rights and interests in all matters and things in question in this cause shall receive the protection of this Court; that, as prayed for by the complainants herein, this Court make and give its decree settling the construction of said will and directing the complainants in what manner they shall carry the trusts thereof into execution, so as to enable them to execute said trusts properly and with safety to themselves, and to this respondent; that such decree be given and made herein by this Court as may be adequate for the full protection of all the rights and interests of this respondent; that this respondent may have such other and further relief herein as to this Court shall seem meet and proper, and as the nature and justice of this cause may require; and that this respondent may have her reasonable costs and disbursements herein necessarily incurred.

And as in duty bound, this respondent will ever respect-
44 fully so pray.

(Signed) ABIGAIL W. KAWANANAKOA,
Said Respondent.

(Signed) J. J. DUNNE,
Solicitor for said Respondent.

HONOLULU, ISLAND OF OAHU,
Territory of Hawaii, ss:

Abigail W. Kawananakoa, being duly sworn upon oath deposes and says that she is the respondent named in the foregoing answer; that she has read the same and that all of the matters and things therein stated and set forth are true.

(Signed) ABIGAIL W. KAWANANAKOA.

Subscribed and sworn to before me this 22nd day of September, A. D. 1905.

(Signed) ANTONE MANUEL,
Notary Public, First Judicial Circuit, Territory of Hawaii

[NOTARIAL SEAL.]

Due service of the foregoing Answer and receipt of a copy thereof, are hereby admitted, this Friday, the 22nd day of September, A. D. 1905.

(Signed) HOLMES & STANLEY,
Solicitors for Complainants.

Endorsed: Reg. 1 223. E. 1488. Circuit Court, First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell-Parker *et al.*, Complainants, *vs.* Abigail K. Campbell-Parker *et al.*, Respondents. Answer of Abigail W. Kawananakoa. Filed Sept. 22, 1905, at 11:10 A. M. George Lucas, Clerk. J. J. Dunne, Honolulu, Hawaii, Solicitor for said Abigail W. Kawananakoa.

45 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

Bill for Construction of Will.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Joint Answer of Muriel K. Campbell, a Minor, and Beatrice U. (Mary) Campbell, a Minor by E. C. Peters, Esq. their Guardian Ad Litem.

To the Honorable John T. DeBolt, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, or other, the Judge of said Court, presiding at Chambers.

The joint answer of Muriel K. Campbell, a minor and Beatrice U. (Mary) Campbell, a minor two of the respondents above named by E. C. Peters, Esq. their guardian ad litem, to the bill of complaint of the above named complainants filed herein for a construction of the will of James Campbell, deceased.

Said respondents, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception, or otherwise, which can be had or taken to the said
46 complainants' said bill of complaint, or to the many errors, uncertainties and imperfections, in said bill of complaint, for answer thereto or to so much thereof as these respondents are advised is in any wise necessary or material for them to make answer unto saith:

First. These respondents show, that in the above entitled cause by an order of the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Circuit, sitting at Chambers, in Probate, dated September 1st, 1905, and duly filed in said Court, E. C. Peters, Esq. was duly and regularly appointed their guardian ad litem herein and ever since has been and now is such guardian *ad litem*.

Second. These respondents admit all the allegations in paragraph 1 of said bill of complaint contained.

Third. These respondents admit all of the allegations in paragraph 2 of said bill of complaint contained.

Fourth: These respondents neither admit nor deny that the said complainants as executor as executrix and executors respectively of the will of James Campbell, deceased, have paid all legacies provided for by the said will, but leave complainants to their proof

thereof; and as to the remaining and other allegations in paragraph 3 of said bill of complaint contained these respondents admit the same.

Fifth. These respondents admit all of the allegations in paragraph 4 of said bill of complaint contained.

Sixth. These respondents admit all of the allegations in paragraph 5 of said bill of complaint contained.

Seventh. These respondents admit all of the allegations of paragraph 6 in said bill of complaint contained.

Eighth. These respondents neither admit nor deny the allegations in paragraph 7 in said bill of complaint contained but
47 leave complainants to their proof thereof.

Ninth. And by way of answer to the allegations of paragraph 8 in said bill of complaint contained these respondents say that it was provided in and by the eighth clause of the will of said deceased that the complainants as trustees segregate, and keep separate and apart during the life of the wife of said deceased, the accounts of and pertaining to the realty of the estate of said deceased from the accounts pertaining to any and all other thereof.

Tenth. These respondents by way of answer of paragraph 9 in said bill of complaint contained and particularly subdivision 1 of said paragraph admit that by a decree of a Judge of the Circuit Court of the First Judicial Circuit sitting at Chambers, in Probate, dated August 31st, 1900 and duly filed in said Court the value of the property, real and personal, belonging to the said estate was adjudicated and it was ordered and decreed that the value of the personal property belonging to the said estate at the time of the said decree, was $1,073,225.74 and that the sum of $357,741.91, being a one-third part thereof, should be paid in manner provided by the third clause of the will of said deceased to the said Abigail K. Campbell Parker, complainant and respondent herein; and as to the other and remaining allegations of said sub-division of said paragraph these respondents leave complainants to their proof thereof, neither admitting nor denying the same.

Eleventh. And by way of further answer of the allegations in paragraph 9 of said bill of complaint contained, and particularly sub-division 2 thereof these respondents admit that the cost of maintaining and repairing the residence-house at Emma Street and Leahi, Honolulu, since the death of the said deceased has amounted
48 to the sum of $46000, or thereabouts and that the same has been paid by the complainants as executrix and executors respectively; but as to the other and remaining allegations of said sub-division of said paragraph these respondents neither admit nor deny the same but leave the complainants to their proof thereof.

Twelfth: And these respondents further say by way of answer to the allegations of said paragraph 9 and particularly as to sub-division 3 thereof that by a decree of a Judge of the Circuit Court of the First Judicial Circuit, dated June 22nd, 1900, the complainants, as executrix and executors respectively were directed to pay to the said Abigail K. Campbell Parker as and for a family allowance a sum not exceeding $1500 per month from the 21st day of April, A. D. 1900 until the further order of said Court, and that the executrix

and executors did pay to the said Abigail K. Campbell Parker the said monthly allowance of $1500 from the 21st day of April, A. D. 1900 until the 3rd day of July, A. D. 1905 when they were discharged as such executrix and executors respectively and that the said sum so paid to the said Abigail K. Campbell-Parker amount in the aggregate to the sum of $93000; but as to the other and remaining allegations of said sub-division of said paragraph these respondents neither admit nor deny the same but leave complainants to their proof thereof.

Thirteenth: And these respondents answering further the allegations in paragraph 9 of said bill of complaint contained and particularly sub-division 4 thereof admit that the conduct and management of the estate of said deceased the executrix and executors of the said will have paid considerable sums of money aggregating $85000 or thereabouts such as executors commissions on the income from the realty, insurance, taxes, water rates, alterations to buildings other than homesteads and so forth; but as to the other
49 and remaining allegations of said sub-division of said paragraph these respondents leave complainants to their proof thereof neither admitting nor denying the same.

Fourthteenth: And concluding their answer these respondents say as to the allegations of said paragraph 9 and particularly paragraph 5 thereof, that prior to the discharge of the complainants as executrix and executors respectively, the said Abigail K. Campbell-Parker has expended (over and above the said sum of $1500 per month paid to her by way of "family allowance" for the use of herself and her children) the sum of $3197.15 for the travelling expenses and maintenance of her children four of the respondents, while on their tour from Honolulu to California during the year 1900 and the sum of $548.80 for the maintenance and education and expenses of foreign travel of one of her said children to-wit the respondent Muriel K. Campbell, such sums aggregating in all the sum of $3745.95 and admit the allegations in said complaint contained in that regard; but as to the other and remaining allegations of said sub-division of said paragraph the respondents neither admit nor deny the same but leave complainants to their proof thereof.

Wherefore these respondents and each of them pray that their and each of their *rights* and interest in all matter and things in question in this cause shall receive the protection of this Court; that this Court make and give its decree settling the construction of said will and directing the complainants in what manner they shall carry the trusts thereof into execution, and that these respondents and each of them have such other and further and proper relief herein as your Honor shall deem meet and proper in the premises.

And these respondents will ever pray.

MURIEL K. CAMPBELL, A *Minor, and*
BEATRICE U. (MARY) CAMPBELL,
A *Minor.*

(Signed) By E. C. PETERS,
Guardian ad Litem.

(Signed) E. C. PETERS,
Solicitors for said Minors.

50 ISLAND OF OAHU,
Territory of Hawaii, ss:

E. C. Peters being first duly sworn on oath deposes and says. That he is the guardian *ad litem* in the foregoing answer named; that he has read the same and that all matters and things therein alleged are true.

(Signed) E. C. PETERS.

Subscribed and sworn to before me this 2nd day of October, A. D. 1905.

(Signed) JNO. M. KEA,
[NOTARIAL SEAL.] *Notary Public, First Judicial Circuit, Territory of Hawaii.*

Service of a copy of the within joint answer of Muriel K. Campbell, a minor and Beatrice U. (Mary) Campbell, a minor by E. C. Peters, their Guardian *ad litem*, is hereby admitted this 2nd day of October, A. D. 1905.

——— ———,
Solicitors for Complainants.

(Signed) A. G. M. ROBERTSON,
Solicitor for Abigail K. Campbell Parker.

(Signed) THOMPSON & CLEMONS,
Solicitors for Alice K. Macfarlane.

(Signed) J. J. DUNNE,
Solicitor for Abigail Helen Kapiolani Kawananakoa, a Minor; David Kalakaua Kawananakoa, a Minor, and ——— Kawananakoa, a Minor.

Endorsed: (Original) E. 1488. Circuit Court First Circuit Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell Parker *et als.*, Complainants *vs.* Abigail K. Campbell Parker *et als.* Respondents. Joint Answer of Muriel K. Campbell, a Minor and Beatrice U. (Mary) Campbell, a Minor, by E. C. Peters, their Guardian *ad litem*. Reg. 1 223. Filed October 2d 1905 at 3:20 P. M. J. A. Thompson, Clerk. E. C. Peters Att'y for Respondents.

51 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Equity. At Chambers.

Equity. 1488.

A. K. C. PARKER ET ALS.
v.
A. K. C. PARKER ET AL.

FRIDAY, *March 23rd*, 1906—10 o'clock a. m.

Transcript of Evidence.

Mr. CECIL BROWN, called by petitioners, sworn.

Direct examination.

By Judge STANLEY:

Offers in evidence Probate Record 3404. Received and marked Petitioners' Exhibit —.

Q. Mr. Brown. You are one of the trustees under the will of the Estate of James Campbell?
A. I am.
Q. And were formerly one of the executors?
A. I was.
Q. You are and were familiar with the condition of the estate since taking charge?
A. Yes, it is in our office where it was managed.
Q. Managed in your office under your supervision?
A. Yes.
Q. Can you state what approximately is the value, and was at the time of this petition, the approximate value of the realty belonging to the estate?
52 A. About nine hundred ($900,00-) thousand dollars.
Q. Can you state what the approximate annual income from that realty is?
A. From seventy five to eighty thousand dollars a year.
Q. Can you state at the time of the filing of this bill what the approximate value of the personalty of the estate was?
A. Between thirty five and forty thousand dollars——
Q. The value of the personalty?
A. Over a million dollars.
Q. And the income——
WITNESS: No, no, not over a million——
Mr. STANLEY: It is seven hundred thousand isn't it?
A. Yes, seven hundred thousand dollars.
Q. That is correct?
A. Yes; I was thinking of both the realty and personalty.
Q. Can you state what the value approximately from that personal property is annually?

A. I have a memorandum here—between thirty five and forty thousand dollars a year for the personal property.

Q. You allege in Paragraph 8—If the Court please, I wish at this time to amend paragraph eight of the Bill by the addition of the words (reads said paragraph)—I wish to amend the bill by adding the words: "during the life of the said Abigail K. C. Parker" to make it conform to the will.

Mr. STANLEY (to witness): In paragraph Nine with regard to the first question raised, Mr. Brown, you allege that——

WITNESS: We did as a matter of fact, both the realty and personalty accounts were all kept separate in accordance with the
53 terms of the will, or directions of the will——

Mr. STANLEY: You allege Mr. Brown in paragraph Nine of the petition that "doubts have arisen in the minds of the complainants as to the true construction of certain of the provisions and trusts contained in said will"—is that true as far as you are concerned?

WITNESS: It is a fact—everyone of them.

Mr. WATSON: I will admit the doubt.

Mr. STANLEY: Mr. Brown, the first paragraph of the will provides "to reduce to possession all real and personal property of the testator (after giving instructions as to the payment of debts) and pay to the wife of the said testator, Mrs. Abigail K. C. Parker—that the executrix and executors should pay this legacy of one-third proportion of the sum which in accordance with the first clause of the said will should be finally decreed and determined to be the value of the personal property belonging to the said estate, to Mrs. Abigail K. C. Parker, as rapidly as the income and interests of the said estate should permit without the sale of any real estate or the sacrifice of any personal property as a means of raising such sum—I will ask you first, as to whether you have paid to Mrs. Parker the amount decreed to be paid to her under the will?

A. We have,—three hundred and fifty seven thousand dollars and some odd, and paid it within the two years' time limited under the will.

Q. I would ask you whether or not you converted any of the property—whether you sold any of the personal property or any real estate for the purpose of making that payment?

A. No; there was on hand at the time of the death of Mr. Campbell a sum of money amounting to two hundred and eighty
54 ($280,000) thousand dollars, and whatever balance of money that was paid to her to make up the amount of her right was paid out of the income of the estate irrespective of whether it was derived from the personalty or from the realty; they were the only funds drawn from.

Q. There was no conversion——

A. No, there was no conversion of any property of the estate, realty or personalty, to pay this legacy.

Q. Can you state whether or not Mr. Brown, that the whole amount of this legacy to Mrs. Parker was paid at one time?

A. No, it was paid at different times.

Q. Why was it paid at different times?

A. It was paid at different times for the reason that it could not be paid at once without the conversion of some of the realty or personal property, and as the income came in—the money came in Mr. Carter, who was acting for Mrs. Parker, wanted money for investments and as we had it on hand we paid it to Mrs. Parker.

Q. I take it, Mr. Brown, from what you say, in your judgment it was not—the judgment of the executors—for the best interests of the estate to have paid it at one time?

A. No, it was not; we had two years in which to pay it; if we had paid it before that time—if that provision had not been in the will, we would have had to make a conversion of some of the real or personal property in order to make up the amount to pay her.

Q. To avoid the conversion of any of the real or personal property, which was prohibited in the will, you paid it in instalments?

A. Yes, Mrs. Parker agreed, with the rest, to draw it from—in instalments as the estate had the funds, and I think the last
55 payment was made something like six months, before the filing—that is my recollection—before the end of the two years.

That is all.

Cross-examination of CECIL BROWN:

By Mr. WATSON: I would like to ask Mr. Brown the approximate total amount of the debts owed by James Campbell at the time of his death?

A. He didn't owe a dollar,—except for his funeral expenses; not a dollar.

Q. Can you state approximately what the amount of the actual cash on hand was at the time of the death of James Campbell?

A. If you will give me the accounts I can—(referring to document on file). The balance on hand in my hands as agent for Mr. Campbell, on his death, was $238,039.15.

That is all.

WITNESS: So that makes the amount that had to come out of the estate—one hundred and forty four thousand dollars that had to come out of the estate to settle with Mrs. Parker for her one-third interest under the will——

Mr. DUNNE: Isn't that One hundred and twenty-four thousand dollars instead of one hundred and forty four thousand?

A. Yes, that makes one hundred and twenty four thousand dollars ($124,000).

Mr. WATSON: Can you state as a matter of fact that none of the personalty was converted—except for those purposes—there was some personalty sold?

A. None converted for the purpose of paying this legacy, but after this money was paid, after Mrs. Parker was settled with.

56 Mr. DUNNE: I will ask Judge Stanley if the probate record in the Campbell Estate is in this case for all purposes?

Judge STANLEY: It is.

Mr. DUNNE: No questions.

Mr. ROBERTSON: There is no question but what the income from the realty was sufficient to pay the general expenses of maintaining it, including commissions, also including the sum of forty six thousand dollars expended in the maintenance and repairs of the two residences?

WITNESS: The rents from the realty were the largest portion of the estate——

Q. I am asking you whether as a matter of fact during the period referred to by this—by these accounts, the income from the realty was sufficient to pay all expenses of maintaining it, including commissions, also including the sum of forty-six thousand dollars paid for the maintenance and repair of the two residences?

A. There was no deficiency; it was ample for this—they were all charges, and all the accounts kept separate.

Mr. ROBERTSON: I wish also to ask you whether the income from the personalty was ample and sufficient to pay the amount of the family allowance, as heretofore authorized by the Court to be paid by the executors, and also the additional sum mentioned in the bill of complaint——

A. Yes, you see from the death of Mr. Campbell to July 31st 1902, the rents from the realty was $215,018.21, and the income from the personalty was $89,330.36.

Mr. ROBERTSON: In this connection, it is alleged in the bill of complaint that the family allowance paid by the executors to Mrs. Parker aggregated the sum of Ninety three thousand ($93,000) dollars——

57 A. The time covered by these figures which I read, that is the income to 1902, July 1st.

Q. You mean for one year only?

A. No, from the time of his death, Mr. Campbell's death,—he died in 1900.

Mr. DUNNE: That would make the gross receipts only seven hundred and nine thousand dollars?

A. The gross receipts of the estate to July 31st, including the cash on hand at the time of the death of Mr. Campbell, was seven hundred and nine thousand, seven hundred and forty two and seventy nine ($709,742.79).

Mr. ROBERTSON: What did you say the income from the personalty was?

A. From the date of Mr. Campbell's death to July 31st 1902 it was eighty nine thousand three hundred and thirty dollars and thirty six cents ($89,330.36).

Q. Was the amount paid out for the family allowance more than the income from the personalty?

A. No; because this amount, $89,330.36 was from 1902 to July of last year; it was fifteen hundred dollars a month or eighteen thousand dollars a year, five years since the death of Mr. Campbell, would make it ninety three thousand ($93,000) dollars.

That is all.

By Mr. THOMPSON: Then the family allowance ceased——

WITNESS: We have paid no family allowance since the discharge, as executors.

By Mr. WATSON: Are you able to state whether or not the income from the personalty and realty from the time of the death of the testator up to the time of the distribution by the trustees was sufficient to pay the debts, the legacies, family support, and
58 all other charges contained in the will?

A. Certainly, and a big balance besides.

Q. That is the income from the realty and personalty would have been sufficient to pay all the charges contained in the will and there would have been a surplus besides?

A. Certainly, the income from the estate during the five years from Mr. Campbell's death until the time the executors were discharged on the 3rd of July last year, would have been sufficient to pay Mrs. Parker and all the expenses, everything, none of the principal would have been called upon, but at it was we took two hundred and thirty three thousand ($233,000) of the principal of the estate to help pay her (Mrs. Parker); but if it had not been touched the whole income from the estate would have paid all the expenses, paid Mrs. Parker and had a big surplus besides.

Judge STANLEY: It was necessary for you to draw on the capital in order to meet the provisions of the will, that the legacy be paid within two years?

A. Yes sir.

Mr. WATSON: Can you state how much money would have been necessary to take from the corpus of the estate to make that payment within two years, whether it was necessary to take the entire amount of the cash on hand for that?

A. It would be one hundred and twenty four thousand dollars—the difference between the money we had on hand, two hundred and thirty three thousand dollars, and the amount we had to pay out, three hundred and fifty seven thousand dollars, making one hundred and twenty four thousand dollars.

Q. Wouldn't that whole amount have been made out of the income during the first two years?

A. No, I do not,—not pay the expenses of the estate; I
59 do not think the income for the two years would, because the income from the estate during Mr. Campbell's life was from one hundred to one hundred and twenty thousand dollars a year, it averaged that right along and since right up to date—

Mr. WATSON: Those figures that you give, one hundred and twenty four thousand dollars, they are not the figures showing just what the difference would have been between the income actually received and the amount of the legacy paid Mrs. Parker?

A. Well, that is, one hundred and twenty four thousand dollars of the income was applied towards the principal, two hundred and thirty three thousand dollars in order to make that payment within two years.

Q. Within the two years then there was a balance still left to the estate of the income from both the personalty and realty——

Judge STANLEY: It was necessary for the estate to draw from the

capital the sum of one hundred and twenty four thousand dollars in order to make the payment to Mrs. Parker in two years?

A. No, we did not pay it out of the income, we had to pay it out of the principal.

Mr. DUNNE: Then what did you treat this cash on hand at the time of the death of Mr. Campbell, capital or principal?

A. We treated that as capital; that was capital on hand at the time of his death.

Judge STANLEY: You used that to pay Mrs. Parker's legacy, plus the contributions from the income?

A. Yes, one hundred and twenty four thousand dollars.

Q. And the motive for resorting to this cash on hand at the time of the death of Mr. Campbell was because of the two year limitation in the will requiring you to pay Mrs. Parker within that time?

60 A. Yes, if we did not pay it to her at that time, she was to get interest on the amount of her legacy, but as we had that cash on hand we had no cause to convert any property that was intact at the time of his death to pay that—to meet that payment.

Mr. WATSON: This point—you say when the payment of two hundred and thirty three thousand dollars was made the balance due was one hundred and twenty four thousand dollars, or thereabouts?

A. Yes.

Q. And that one hundred and twenty four thousand dollars was paid out of the income of the estate?

A. Yes.

Q. You seem to assume then that the primary fund liable is the cash on hand at the time of the death of the testator, and you make up the surplus out of the income?

A. Yes.

Q. Now after you took the one hundred and twenty four thousand dollars from the income to make up this legacy can you state what the surplus of the income was on hand at that time?

A. I cannot tell you without figuring it out. I should support about one hundred and sixty thousand dollars.

Q. Then the income alone could have been paid on account of this legacy, one hundred and eighty four thousand dollars instead of one hundred and twenty four thousand dollars, and it would only have been necessary to make up the difference out of the cash on hand?

A. That is one of the reasons why we are asking—what we are asking for in this bill, one of the questions raised, is whether that amount we have paid to Mrs. Parker was correctly charged against the principal—I mean against the income, or whether there should have been a conversion on the part of the trustees to pay the

61 people who were entitled to the income under—that is one of the questions raised in this bill, it is one of the material questions.

Q. Your position then is that it would have been actually necessary to take at least one hundred and seventy three thousand dollars of the cash on hand in order to meet this legacy within the time required.

A. Well, say the income is from one hundred to one hundred and twenty thousand dollars a year—Mr. Campbell died in April 1900, and these accounts were made up to the 31st of July 1902, that would be, say two hundred and forty thousand dollars, or—say two hundred or two hundred and twenty thousand dollars, one hundred and twenty four thousand dollars of that would apply—was taken out of that amount to give to Mrs. Parker to make up her Three Hundred and Fifty seven thousand dollars, a part of which, as I say, was the principal, two hundred and thirty three thousand dollars; it was principal because it was cash on hand when he died.

Q. If you had resorted to the income, primarily, it would have been necessary to take all the cash on hand as you did.

A. No; it would have taken pretty nearly three years to make the payment within the time——

Q. To make the payment within the time you were limited?

A. We could not have done it with the income.

Q. How much cash on hand would it have taken to make up that shortage?

A. The difference between one hundred and twenty thousand and three hundred and fifty seven thousand dollars.

Judge STANLEY: You only resorted to the capital when you had nothing to pay?

A. Yes.

62 Mr. ROBERTSON: Since the discharge of the executors have the trustees paid out anything for the support and maintenance of the minors?

A. None at all, we refused to. There is a provision in the event they want to go away.

(Endorsed:) Filed August 30, 1906, at 3:20 P. M. J. A. Thompson, Clerk.

63 In the Circuit Court of the First Circuit, Territory of Hawaii.
At Chambers. In Equity.

E. No. 1488.

ABAGAIL K. CAMPBELL PARKER *et al.*, Trustees under the Will and of the Estate of James Campbell, Deceased, Petitioners,
vs.
ABAGAIL K. CAMPBELL PARKER *et al.*, Respondents.

Bill for Construction of Will of James Campbell, Deceased.

Hearing on Bill.

FRIDAY *March 23rd*, A. D. 1906.

Before Hon. Alexander Lindsay, Junior, Second Judge.

W. R. Sims, Clerk. G. D. Bell, Stenographer.

The following counsel appeared for parties indicated:

W. L. Stanley, Esquire, of Holmes and Stanley, appearing for Executrix and Executors and Trustees under said Will;

Cecil Brown, Esquire, Executor and Trustee in person;
J. J. Dunne, Esquire, for Princess Kawananakoa, beneficiary under said Will;
C. F. Clemons, Esquire, of Thompson and Clemons, for Mrs. Alice Campbell Macfarlane, beneficiary under said Will;
E. M. Watson, Esquire, for Minor Children of Princess Kawananakoa, beneficiaries under said Will;
A. G. M. Robertson, Esquire, for Mrs. Abigail K. Campbell Parker, widow of deceased in her personal capacity;
E. C. Peters, Esquire, for Campbell Minors, beneficiaries under said Will.

64 Judge Stanley presents and reads Bill of Complaint.

Mr. Robertson presents and reads answer of Abagail K. Campbell Parker.

Mr. Dunne presents and reads answer of Princess Abbie W. Kawananakoa.

Mr. Clemons presents and reads answer of Mrs. Alice Campbell Macfarlane.

Mr. Watson presents and reads answer of Kawananakoa minors.

Counsel admit the amount and necessity of expenditures for foreign travelling of four children referred to in the Bill of Complaint.

Probate record, Estate of James Campbell, No. 3404, First Circuit Court, received in evidence on motion of Judge Stanley as Petitioners' Exhibit "A."

Cecil Brown sworn and examined.

Judge Stanley moves to amend paragraph eight of the Bill of Complaint by adding the words "during the life of the said Abigail K. Campbell Parker" after part.

The Court suggests the submission of the case upon briefs and, after discussion by counsel, it is ordered that briefs be filed by Messrs. Dunne, Peters and Watson within ten days. Return briefs to be filed within five days thereafter; said first parties to be allowed five days further to reply to any new matter raised in said return briefs.

MONDAY, *April 2nd*, A. D. 1906.

The Court denies motion of E. M. Watson to hear testimony of C. W. Ashford, Esquire, on the ground that same is *un*admissable at this time.

MAY 15TH, A. D. 1906.

The Judge in open Court hands down written decision on the Bill for the Construction of Will and orders same filed and counsel notified thereof.

65 Circuit Court, First Circuit. In Probate.

($2. Stamps.)

In the Matter of the Estate of JAMES CAMPBELL, Deceased, Testate.

Petition for Probate of Will.

To the Honorable A. Perry, First Judge of the Circuit Court of the First Circuit:

Your petitioners J. O. Carter, A. K. Campbell and Cecil Brown, all of Honolulu, Island of Oahu, herewith present to this Court the Last Will and Testament of James Campbell, deceased, and showeth as follows:

That said James Campbell died in Honolulu on or about the 21st day of April, A. D. 1900, being at that time a resident of and leaving estate in the Hawaiian Islands, the probable value and character of which are as follows, viz:

Real Estate in the Hawaiian Islands, valued at.....	$770,160.
" " in San Jose, Cal. valued at.....	$150,000.
Total value.....	$920,160.
Personal Estate consisting of Cash in hand, notes, bonds, Mortgages and stocks, and valued at.....	$982,531.15

That when said Will was executed the said James Campbell was of the age of 65 years and upward, of sound mind, and in every respect competent to make and publish a Will and Testament.

That said deceased left a widow living, and as his heirs at law and next of kin the persons whose names, residences and re-
66 lationship are as follows, viz: Abigail K. Campbell, widow, residing at Honolulu, Abbie Campbell, daughter, aged 17, at present residing at San Jose, Cala., Alice Campbell, daughter, aged 15 years, residing at present at San Jose, Cala., Muriel Campbell, daughter, aged 9 years, residing at Honolulu, and Mary Campbell, daughter, aged 5 years, residing at Honolulu.

That in said Will said Abigail K. Campbell, widow, and said Abbie, Alice, Muriel and Mary Campbell, children, are named as devisees and legatees, and Abigail K. Campbell, Executrix, and Joseph O. Carter and Cecil Brown, as Executors and Trustees.

Wherefore your petitioners pray, that said Will may be admitted to probate, and Letters Testamentary be issued to Abigail K. Campbell, J. O. Carter and Cecil Brown. And that this Honorable Court will therefore appoint a day for hearing, and order notice of the same to be given by publication to all persons interested herein, and that in the meantime and until the probate of said Will, that said Abigail K. Campbell and J. O. Carter and Cecil Brown may be appointed Temporary Administratrix and Administrators of the

Estate of said James Campbell, deceased, in order that the collections of the income from said Estate may be legally proceeded with.

Dated, Honolulu, April 27th, 1900.

ABIGAIL K. CAMPBELL.
J. O. CARTER.
CECIL BROWN.

Subscribed and sworn to before me this 27th day of April, 1900, by J. O. Carter & Cecil Brown.

P. D. KELLETT, Jr.,
Clerk Circuit Court of the First Circuit.

(Endorsed:) Circuit Court First Circuit. In Probate. *In Re* Estate of James Campbell, deceased. Petition for Probate of Will. Received $25.00. Filed Apr. 27, 1900. P. D. Kellett, Jr., Clerk.

67 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Probate. At Chambers.

Before Judge Stanley.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Order of Probate.

On this 22 day of June, 1900, before said Circuit Judge in Honolulu came on to be heard the Petition of Abigail K. Campbell, J. O. Carter and Cecil Brown praying that a document, alleged to be the Last Will and Testament of said deceased, be admitted to Probate, and that Letters Testamentary be granted to them:

And it appearing that sufficient notice of this hearing has been given to all parties concerned, the Court finds the following facts from the evidence adduced:

That said James Campbell died on or about the 21st day of April, 1900, at Honolulu; that said alleged Will was executed by him on the 8th day of July, 1896, at San Francisco, Cala. in the presence of F. Wundenberg, C. T. Wilder and C. W. Ashford as subscribing witnesses; that said testator at the time of the execution of the said Will was of sound and disposing mind, and was competent to make a Will, and that the said Will was duly executed, as required by law, and that in said Will said testator named Abigail K. Campbell, Executrix, J. O. Carter and Cecil Brown Executors and Trustees.

Wherefore, it is ordered, that said document, now in Court, and hereto attached, is hereby admitted to Probate as the last Will and Testament of said James Campbell.

68 And it is further ordered, that Letters testamentary be issued to Abigail K. Campbell, J. O. Carter and Cecil Brown that the usual notice to creditors be published once a week for 4 successive weeks in the P. C. Advertiser. Inventory to be filed in

30 days and a bond be given by the Executrix and Executors in the sum of $100,000.

Dated Honolulu June 26th, 1900.

(S.) W. L. STANLEY,
2nd Judge of the Circuit Court
of the First Circuit.

Attest:

(S.) S. C. BIDDELL,
Clerk of the Circuit Court
of the First Circuit.

Executors' Bond filed & Letters Testamentary issued this June 29th, 1900.

(Endorsed:) The foregoing is a true, full and faithful copy of the original Will and Order of probate in this matter, on file in the Office of the Clerk of the Supreme Court. P. D. Kellett, Jr., Clerk First Circuit Court. Received the original Will and Order of Probate this 26th day of June, A. D. 1900. Henry Smith, Clerk Supreme Court. Circuit Court First Circuit. Estate of James Campbell. Order of Probate. Filed June 26, 1900. (S.) S. C. Biddell, Clerk.

69 In the Circuit Court of the First Circuit, Hawaiian Islands.

($1.00 Stamp.)

In the Matter of the Estate of JAMES CAMPBELL.

Before Judge Stanley.

Know all men by these presents, that we Abigail K. Campbell J. O. Carter and Cecil Brown as Principals, and Fred Harrison, E. S. Cunha & F. Hustace, surety are jointly and severally held and firmly bound unto the Honorable A. Perry, First Judge of the Circuit Court of the First Circuit of the Hawaiian Islands, and his successors in Office, in the penal sum of one hundred thousand ($100,000.) dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our Seals, and dated this 22 day of June A. D. 1900.

The condition of the above obligation is such: That whereas the above bounden Abigail K. Campbell, J. O. Carter and Cecil Brown have been duly appointed Executrix & Executors of the Estate of James Campbell: Now if they shall faithfully perform the duties of said office, according to law, then this obligation to be void, otherwise of full force.

Sealed, signed and delivered at the date above named.

ABIGAIL K. CAMPBELL.
J. O. CARTER.
CECIL BROWN.
FRED HARRISON.
E. S. CUNHA.
FRANK HUSTACE.

70 The amount of the penalty, and the sufficiency of the sureties of the above Bond are hereby approved this 28th day of June, A. D. 1900.

W. L. STANLEY,
2nd Judge of the Circuit Court of the 1st Circuit.

Attest:
J. A. THOMPSON,
Clerk Circuit Court of the First Circuit.

(Endorsed:) 1185. Circuit Court First Circuit. P. 3404. 17/131. Estate of James Campbell. Bond of Abigail K. Campbell, J. O. Carter and C. Brown. Filed June 29, 1900, J. A. Thompson, Clerk.

71 In the Circuit Court of the First Circuit, Territory of Hawaii. In Probate.

Letters Testamentary.

($1.00 Stamp.)

The last Will and Testament of James Campbell, deceased, a copy whereof is hereto annexed, having been duly admitted to Probate on this Court, Abigail K. Campbell, Joseph O. Carter and Cecil Brown who are named therein as Executrix and Executors, are hereby authorized to perform the duties of Executrix and Executors of said Will.

By order of the Second Judge of the Circuit Court of the First Circuit, this twenty-second day of June, A. D. 1900.

[SEAL.] P. DAMON KELLETT, JR.,
Clerk of the Circuit Court of the First Judicial Circuit.

(Endorsed:) Circuit Court First Circuit. In Probate. Estate of James Campbell, late of Honolulu, Oahu, Deceased. Letters Testamentary. Issued June 29, A. D. 1900, J. A. Thompson, Clerk.

72 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased Testate.

Petition for Allowance of Accounts, Final Distribution and Discharge.

The petition of Abigail K. Campbell-Parker, J. O. Carter and Cecil Brown, respectfully show that on the 22nd day of June, A. D. 1900, they were duly appointed by this Honorable Court Executrix and Executors of the last Will and Testament of James Campbell, late of Honolulu, Island of Oahu, deceased; that they were duly qualified to act as such, filing an approved bond, and taking out

Letters Testamentary. That on the 19th day of July A. D. 1900, they filed in this Court a sworn inventory of all the property and assets of every kind whatsoever, within their knowledge, belonging to the Estate of said deceased; that they duly advertised notice in the English language to creditors of said Estate in the Pacific Commercial Advertiser, a newspaper printed and published in Honolulu, for four successive weeks, and that more than six months have elapsed since the first publication of said notice.

That they have collected all sums by them known or believed to be due and collectable for the said estate; that as such Executrix and Executors they have done all things required of them by the Statutes or the Orders of this Court, or which faithful and prudent
73 Executrix and Executors ought to do. That they present herewith on Schedules marked A and B, respectively and made part of this petition, their account of receipts and expenditures; also on Schedule marked C, and made part of this petition, a true, faithful and exact Inventory of all property now in their possession and belonging to the said Estate.

Wherefore they pray that upon a day appointed for a hearing of this petition their accounts may be examined and allowed, and that they may be ordered to deliver over such property as remains in their possession to the persons thereto entitled; also that they may be discharged from all further responsibility as such Executrix and Executors; that their bond may be ordered to be cancelled, and the sureties thereto released from further obligation.

ABIGAIL K. CAMPBELL-PARKER.
CECIL BROWN.
J. O. CARTER.

Cecil Brown, one of the petitioners above named, being duly sworn, deposes and says that the matters set forth in the foregoing petition are true.

CECIL BROWN.

Sworn and subscribed before me this 25 day of August, 1902.

GEORGE LUCAS, *Clerk*.

(Endorsed:) Circuit Court First Circuit In Probate. In the Matter of the Estate of James Campbell, dec'd. Petition for allowance of Accounts, final distribution and discharge. Filed August 25, 1902. J. A. Thompson, Clerk. Cecil Brown for petitioners 93 Merchant St.

74 SCHEDULE C.

Executor's, Administrator's, Guardian's or Trustee's Account.

Final Account of Mrs. A. K. Campbell-Parker, J. O. Carter, and Cecil Brown, Executors of the Will of James Campbell, deceased.

The Executors and Executrix charge themselves with the following sum as per Schedule A.....$694,873.10
hereto annexed and asks to be allowed the following sum, as per Schedule B, hereto annexed.....$709,742.79

Dr. Balance.....$ 14,869.69

We hereby certify that the foregoing account, and the Schedules marked A and B, hereto annexed and the vouchers herewith produced and filed, are full, true and correct statements of all sums received and paid out by us, or in our behalf, as said Executors & Executrix up to and including the 31st day of July, A. D. 1902.

CECIL BROWN,
For Self and Executrix & Executor
Last Will of James Campbell.

Sworn and subscribed before me, this 25th day of August, A. D. 1902.

GEORGE LUCAS, *Clerk.*

(Endorsed:) P. 3404 17/131. Circuit Court First Circuit. In Probate. Estate of James Campbell, deceased. Final Account of A. K. C. Parker, J. O. Carter and Cecil Brown Executors. Filed the 25th day of August, A. D. 1902. J. A. Thompson, Clerk.

75 *Recapitulation.*

Income.

Cash on hand at death of J. C.	233,039.15
Rents to July 31, 1902	215,018.21
Income from personal property, to July 31 02	89,330.36
Expense account	562.08
Sundry items sold	245.
Insurance	3,480.46
Principal collected	113,197.84
Mendonca note paid (by exchange for bonds)	40,000.
Balance due trustees	14,869.69
	$709,742.79

Contra.

Expenses proper		67,156.11
Allowance, support & maintenance		40,950.
Homestead additions, alterations, repairs		38,824.88
Mrs. A. K. C. Parker, (Devisee)		357,741.91
Mendonca Bonds (Exchange for mortgage)		40,000.
Investments: First Nat. Bank Stock	25,000.	
Mutual Tel. Co. "	4,168.40	
Haw. Hdw. Co. "	3,125.	
		32,293.40
Mrs. Parker, Income		53,274.65
Abbie W. Kawananakoa, Income		35,920.31
Alice Campbell, "		10,910.01
Commissions due Trustees		32,671.52
		$709,742.79

76 Mrs. A. K. C. Parker.

Method taken to arrive at Income.

Her share is $\frac{1}{3}$ of income from *Realty*, after deducting expenses chargeable to *Realty*.		
Total Income from date of death of J. C. to July 31, 1902,		$215,018.21
Expenses chargeable to Realty as per schedule below,		55,194.26
Net Income from realty		$159,823.95
Mrs. Parker's $\frac{1}{3}$ =		$53,274.65

77 Princess Kawananakoa.

Method taken to arrive at Income.

Her share is $\frac{1}{4}$ of the $\frac{2}{3}$ of Net Income from reality, and $\frac{1}{4}$ of the Net Income from personal property, from January 1, 1901 (date she became of age).		
Gross income from reality, from Jan. 1, 1901, to July 31, 1902, inclusive		166,990.31
Expenses chargeable to reality Jan. 1/01 to July 31/02, as per memo. of expenses attached	34,974.62	
Commissions on reality Income 5% on 166,990.31	8,349.51	
		43,324.13
Net Income reality		$123,666.18
Less $\frac{1}{3}$		41,222.06
$\frac{2}{3}$ reality Income		$82,444.12
Gross Income from personal property, Jan. 1/01 to July 31/02	64,460.13	
Expenses chargeable to personal ppty. income, 5% on 64,460.13	3,223.00	
		61,237.13
		4)$143,681.25
$\frac{1}{4}$ of which is		$35,920.31

78 Alice Campbell.

Method taken to arrive at Income.

Her share is ¼ of: ⅔ of net income from realty, and ¼ of the net income from personal property, from March 17, 1902 (date she became of age).

Gross income from realty from March 17, 1902, to July 31, 1902 (Inclusive)		$42,350.10
Expenses chargeable to realty from March 17 to July 31/02 as per memo. attached...	4,235.83	
5% Commissions on $42,350.10	2,117.50	
		6,353.33
Net Income realty		35,996.77
Less ⅓		11,998.92
⅔ Income realty		$23,997.85
Gross income personal property March 17/02 to July 31/02, inclusive	18,760.17	
Expense chargeable to personal income, 5% on 18,760.17	938.00	
Net income personal property		17,822.17
		4) $41,820.02
Her ¼		$10,910.01

79 *Memo. of Items Chargeable to Realty Ac.*

Page.	Date.	Expense.	Amount.
1	May 8.	Insurance	2090.75
	14.	Likelike Street	3.
	17.	G. Muller	4.
		Haw. Electric Co	15.25
	Jun. 2.	Peniel Mission	4.25
2	Jul. 2.	Sharratt	2.50
	5.	Haw. Electric Co	1.
	14.	Water Rates	187.50
	Aug. 14.	Enterprise Mill	113.
3	23.	Hamasaki	266.
	Sep. 17.	H. M. Mist	35.00
	22.	Muller	1.
4	30.	Hamasaki	49.10
	Oct. 13.	Beretania St. Cottage	10.50
		Lewers & Cooke	10.61
	Nov. 7.	Taxes	186.50
	8.	Glass	7.50
	10.	Taxes	1507.
5	17.	Lucas Bros.	1120.
		Harrison	225.27

Page.	Date.		Expense.	Amount
	Dec.	5.	Haw. Gazette	13.
		20.	Traphagen	450.
1 to 5		31.	Janitor to Dec. 31 '00	36.00
				$9638.73
5	Jan.	4.	Emmeluth	8.60
		9.	Haw. Hardware Co.	563.54
6		11.	John Nott	244.98
			Tax Returns	.75
			Lucas Bros.	1120.
		12	Hamasaki	88.
			Water Rates	187.50
		17.	Kwong Ving Fat Co.	55.85
		19.	Hawaiian Star	6.
			Lau Hoy	200.
		21.	Insurance	220.
	Feb.	2.	Rubbish	3.
			Muller	2.
		9.	Tai Sing Kee	80.
7		26.	Lucas Bros.	5249.50
	Mar.	2.	Sewer connection	75.16
		5.	Robert Grieve, printing	3.75
			Advertising	2.25
		8.	Numbering offices	20.
		9.	Muller	3.
			O. P. Traphagen	728.65
		20.	Directory Campbell Block	7.50
8	Apr.	3.	Fred Harrison	551.48
		10.	Hopp & Co.	46.90
	May	1.	Rubbish	1.50
		14.	Haw. Hardware Co.	11.80
			Insurance	805.
			Insurance	856.25
9	Jun.	1.	Affidavit	.50
			Muller	1.50
				$11,147.96
80			Forward	11,147.96
9	June	1.	Hastings (keys)	3.00
		29.	Lucas Bros.	100.
10	July	6.	Rubbish	1.75
		9.	Water Rates	187.50
		11.	Electricity	2.
		20.	Costs Tax Appeal 505.	
			Less am't returned, 1-22-02 358.50	
				146.50
		30.	Mrs. Angus' p'p'rty	170.52
			Hollister Drug Co.	131.35

Page.	Date.		Expense.	Amount
	Aug.	10.	Electricity	2.25
			England & Co.	8.50
		16.	Muller (keys)	18.
			Board of Health	6.
		17.	John Nott	228.67
11			Sewer Connections	33.05
		31.	W. T. Wilson	144.
	Sep.	4.	Repairs, Mrs. Augus Cottage	79.04
			Electricity	4.50
			Peerless Pre. Paint Co.	394.50
		7.	V. McAvoy	45.
		20.	Kinney, Ballou & McC., re. vault	25.
		24.	Hamasaki	14.30
			John Nott	1086.
12	Oct.	2.	Electricity	4.
		7.	Haw. Hardware Co.	13.
		12.	Hamasaki	60.96
		17.	Fred Harrison	2250.
		21.	Taxes	5806.23
		31.	Fishing rights	37.
	Nov.	1.	Electricity	6.25
		4.	Catton, Neill Co.	55.45
			Rubbish	4.25
13		6.	Camphor balls	.15
		16.	Haw. Gazette	2.50
			Wash. Mercantile Co.	3.00
	Dec.	3.	Electricity	6.25
		27.	F. W. Hankey	50.
			John Nott	206.34
		31.	Sewer Rates	204.50
	Jan.	3.	Fred Harrison	2820.33
		8.	Electricity	19.
14		11.	O. P. Traphagen	350.
			Hamasaki	236.60
			John Nott	112.47
		13.	Water Rates	171.50
		18.	Hamasaki	32.
			J. Nott	6.10
		22.	Notary	.75
			Bal. Taxes	31 6.60
			Bulletin	1.50
	Feb.	1.	Electricity	15.20
		3.	Hamasaki	9.75
			Smith premises	3.
		5.	Clearing yard	1.25
		10.	" "	1.
15	Mar.	1.	Rubbish	6.50
			McKechnie Paint Co.	2.
			Electricity	9.
		7.	John Nott	19.42

Page.	Date.		Expense.	Amount.
		14.	Sharratt	18.
		15.	Hamasaki	14.55
			Forward	$29,985.79
81			Forward	29,985.79
15	Mar.	15.	Cecil Brown, legal services, proportion chargeable to realty	415.
			Janitor, Jan. 1, 1901, to March 17, 1902. $30,738.79	338.
		17.	Notary	2.
16		22.	Haw. Ballasting Co.	16.24
	Apr.	2.	Sharratt	1.25
			Electricity	9.75
		19.	Haw. Hardware Co.	9.25
			Wash. Mercantile Co.	25.
		23.	Haw'n Hardware Co.	10.50
		24.	John Nott	277.35
17	May	1.	Public Works	3.
			Haw. Electric Co.	11.40
		3.	Sharratt	1.
			Fred Harrison	170.54
		7.	Insurance	1661.25
		8.	J. Nott	625.88
		9.	C. Notley	8.
18		13.	Catton, Neill	11.90
		16.	Pacific Hardw. Co.	3.
		19.	J. F. Brown	50.
	Jun.	2.	Haw. Electric Co.	7.25
19		7.	Muller	9.
		21.	"	3.
			J. F. Brown	35.
		30.	W. F. Wilson	220.73
			J. F. Brown	100.
	July	1.	Haw. Electric Co.	7.50
		3.	Peerless Pre. Paint Co.	150.
			Notary	2.
		7.	Water Rates	154.
20		10.	Mercantile Printing Co.	3.50
		17.	Costs Certificate, Award	4.
			Dep. Costs Tax Appeal	42.
			House numbering	7.
		22.	Haw. Hardware Co. bill	73.15
		26.	Fred Harrison	88.87
		28.	John Nott	17.62
			Janitor, Mar. 17 to July 31	114.
				$1,235.83

Recapitulation.

Expenses to Jan. 1, 1901	$9,238.73
" Jan. 1 '01 to Mar. 17 '02	30,738.79
" Mar. 17 '02 to date	4,235.83
	$44,313.35
Commissions on income from realty, $215,018.21, at 5%	10,880.91
10% on 1st 1000...)	
7% on next 4000.	$55,194.26
5% on bal.....)	

82 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased, Testate.

Order of Notice of Hearing Petition for Allowance of Final Accounts, Distribution, and Discharge.

On reading and filing the petition and Accounts of Abigail K. Campbell-Parker, J. O. Carter and Cecil Brown, Executrix and Executors of the last Will and Testament of James Campbell, deceased, wherein they ask to be allowed $709,742.79, and they charge themselves with $694,873.10, and ask that the same may be examined and approved, and that a final order may be made of distribution of the property remaining in their hands to the persons thereto entitled, and discharging them and their sureties from all further responsibility as such Executrix and Executors,

It is ordered, that Friday, the 10th day of October, A. D. 1902, at 10 o'clock A. M. before the Hon. Geo. D. Gear, Second Judge of said Court at the Court Room of said Court at Honolulu, Island of Oahu, be and the same is hereby appointed as the time and place for hearing said petition and Accounts, and that all persons interested may then and there appear and show cause, if any they have, why the same should not be granted, and may present evidence as to who are entitled to the said property. And that notice of this Order in the English language, be published in the Daily Evening

83 Bulletin, a newspaper printed and published in Honolulu, for three successive weeks, the last publication to be not less than two weeks previous to the time therein appointed for said hearing.

Dated, Honolulu, this 25th day of August, 1902.

GEO. D. GEAR,
2nd Judge Circuit Court of the First Circuit.

(Endorsed:) P. 3404. Circuit Court First Circuit In Probate. In the Matter of the Estate of James Campbell, dec'd. Order of Notice of hearing petition for allowance of final accounts, distribution and discharge. Filed August 25, 1902. J. A. Thompson, Clerk. Cecil Brown for petitioners. 93 Merchant St.

84 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL.

Affidavit of Publication.

George Lucas of Honolulu being sworn, says that he has examined a file of the Evening Bulletin a daily newspaper published in the English language at Honolulu; and that the notice of which the annexed is a printed copy, was published in said newspaper four times, to wit: Aug. 26, Sept. 2, 9 & 16 1902 and that the last publication was not less than two weeks previous to the time therein appointed for the hearing.

GEORGE LUCAS.

Subscribed and sworn to before me this 10th day of Oct. 1902.

J. A. THOMPSON,
Clerk of the Circuit Court of the First Circuit.

In the Circuit Court of the First Circuit. Territory of Hawaii. In Probate; at Chambers. In the Matter of the Estate of James Campbell, Deceased, Testate. The petition and accounts of the Executrix and Executors of the Will of said deceased, wherein they ask that their accounts be examined and approved, and that a final order be made of distribution of the property remaining in their hands to the persons thereto entitled, and discharging them from all further responsibility as such Executrix and Executors having this day been filed; notice is hereby given that Friday, the 10th day of October, A. D. 1902 at ten o'clock a. m. at Chambers, in the Court House, at Honolulu, be and the same hereby is appointed as the time and place for hearing said Petition and accounts, and that all persons interested may then and there appear and show cause, if any they have why the same should not be granted.

Honolulu, Oahu, August 25, 1902.

By the Court:

J. A. THOMPSON, *Clerk.*

CECIL BROWN,
Attorney for Petitioners.

2234—Aug. 26; Sept. 2, 9, 16.

(Endorsed:) Circuit Court First Circuit. In Probate. Estate of James Campbell. Affidavit of Publication. Filed Oct. 10, 1902. J. A. Thompson, Clerk.

85 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased, Testate.

In re Petition to Pass and Allow the Final Accounts of the Executrix and Executors and to Order the Discharge of the Executrix and Executors.

To the Honorable George D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, in and for the Territory of Hawaii:

These accounts having been referred to me by your Honor, as Master, I herewith submit the following report and recommendations for your Honor's consideration:

I.

The accounts cover a period commencing April 24th, 1900 and extending to and including the 31st day of July, A. D. 1902.

The Executrix and Executors charge themselves with the sum of	$694,873.10
And they ask to be allowed	709,742.69
Leaving a balance due them of	14,869.69

Some serious and important questions are necessarily involved in passing upon these accounts. I, therefore, deemed it advisable to have hearings in the matter and in pursuance thereof, I notified the several witnesses to appear before me at my office, and testify.

Appearances present: F. M. Brooks, Esq., Counselor-at-Law, pursuant to appointment by your Honor, representing two
86 minors, Muriel and Mary Campbell; Mrs. Samuel Parker; Princess Kawananakoa; Miss Alice Campbell; Hon. Cecil Brown, and Hon. J. O. Carter.

CECIL BROWN, upon being sworn, testified as follows:

"I reside in Honolulu, Island of Oahu. Am one of the Executors and Trustees under the last Will and Testament of James Campbell, deceased.

"All the matters set forth in the first paragraph of the Will and the directions therein contained, have been obeyed and attended to and we have reduced to possession all the property except the St. James Hotel, situated at San Jose, in the State of California.

	"The personal property was inventoried at.....	$1,073,225.74
	And the real estate was inventoried at.....	920,180.00
	And under the Decree filed in this Court on the 21st day of September, A. D. 1900, the sum of..... being the sum of money equal to and equivalent to a one third proportion of the sum finally decreed and determined to be the value of the personal property belonging and pertaining to the estate was decreed to be paid to Abigail K. Campbell, now Mrs. Parker, as her share under the third paragraph of the Will of the deceased.	357,741.91
	All persons interested were heard before the making and entry of this decree. All debts were paid by the Executrix and Executors. There was collected on account of principal the sum of.....	113,197.84
	And the Executrix and Executors reinvested.....	32,293.40
	The assessment upon stock in the First National Bank of Hawaii, amounting at the time to..... was paid; upon stock of the Mutual Telephone Company.....	25,000.00 4,168.40
87	Upon stock of the Hawaiian Hardware Co...	3,125.00
	There was Cash on Hand, at the death of the Testator, which is principal, the sum of.....	233,039.15
	"The gross Rents to July 31st, 1902, were.....	215,018.21
	Income from Personal Property.....	89,330.36
	"The Executrix and Executors deemed it advisable in the best interests of the estate and to better secure the amount due from Mendonca, to exchange the note and mortgage, held by them to secure the payment of..... for bonds, which they accordingly did. These bonds are a first lien and include all the property of Mendonca.	40,000.00
	"There was collected from the sale of sundry articles, the sum of.....	569.08
	And from the same source the sum of.....	245.00
	And from the several Insurance Companies.....	3,480.00
	"In arriving at the one-third due Mrs. Parker under the provisions of the Will, all expenses applicable to realty, amounting to.....	44,313.33
	plus commissions amounting to.....	10,880.91
	or a total of.....	55,194.26
	were deducted from the gross receipts of rental, which left a balance of.....	159,823.95
	Mrs. Parker's one-third being.....	53,274.65
	which is from income of the real estate.	
	"There is still..... due Mrs. Parker, which has not been paid, the estate not being in funds.	20,000.00
	"In accordance with the fourth paragraph of the Will, and before the marriage of the eldest	
88	child, there was expended for repairs on the Emma Street Residence, the sum of.....	38,824.88

"The provisions of the fourth paragraph of the Will have been carried out and no expenditures have been authorized by the Executrix and Executors except for repairs.

The Court decreed and allowed for the expenses and maintenance of the family the sum of..... 1,500.00
per month, and there has been paid, up to July 31st, 1902, under said order, for family maintenance, the sum of..... 40,950.00

I have not, nor has the Executrix and Executors, set aside a fund for the two minor children, as provided for under the Will, there being no funds on hand for that purpose.

Under the tenth paragraph of the Will, the provision is made that upon the arrival of the children at majority, or upon their marriage, their proportion of the income from the estate be paid to them, while the estate is still in the hands of the Executrix and Executors or Trustees.

The Princess Kawananakoa was paid on account of income from January 1st, 1901, to July 31st, 1902, the sum of..... $35,920.31

There was paid on account of income to Miss Alice Campbell, from March 17th, 1902, to July 31st, 1902, the sum of..... 10,910.01

This money was paid out of the income, and the balance was paid to Mrs. Parker and no money remains to provide for the fund for the two minor children out of the income.

89 The Princess has been paid more than her income.
Miss Alice Campbell has not been paid in full.

The princess has been paid..... $13,753.94
in excess of what she is entitled to under the provisions of the Will and Miss Alice Campbell is entitled to..... 11,256.36
more than has been paid her. The minors have not been paid anything.

The further hearing of the testimony was adjourned until Wednesday the 15th day of October, in my office.

On the 15th day of October, pursuant to adjournment, the said Cecil Brown resumed his testimony:

The personal property consisted of notes and mortgages, Kahuku bonds, shares in the First National Bank, stock in the Mutual Telephone Company and in the Hawaiian Hardware Company and 36 shares of American Sugar Company Preferred Stock. All of the personal property was included in the inventory filed and from the amount mentioned therein and the accumulations the value was estimated and returned at..... $1,073,225.74
one-third of which is..... 357,741.91

Mrs. Parker's one-third has been paid to her.

The gross income from realty, the 21st day of April, 1900, to the 31st day of July, 1902, was	215,018.21
and the expenses	55,194.26
leaving a balance of	159,823.95
one-third of which is	53,274.65
which is Mrs. Parker's share of the income derived from the real property. There was paid to her the sum of	33,274.65
90 leaving a balance due her of	20,000.00
The repairs to the Emma Street house and homestead cost	38,824.88

Mr. Traphagen was the Architect. The Executrix and Executors did not ask nor call for tenders. The job was done under the supervision of Traphagen. Master Builder Harrison provided the materials and the work was done under his immediate supervision. Harrison's labor bills were paid and he got ten per cent. on the lumber. The Architect prepared plans and specifications for the re-modeling of the house.

Q. Why did you not call for tenders?

A. On the advise of the Architect we did not call for tenders. We did not ask the advice of any other Architect. The Architect got ten per cent. of the cost of repairs.

Q. What reason do you give for not having called for tenders for this work?

A. Because Mr. Campbell never had his building done by tenders and for twenty years he had employed Mr. Harrison, and in the matter of the Emma Street house Mr. Harrison superintended the work under the direction of the Architect, purchased all the materials supplied and furnished us with vouchers and the estate paid the bills. We paid Harrison ten per cent. for his services on the purchasing of the materials. It was upon the Architect's advice that we acted in not calling for tenders.

Further hearing of this matter was adjourned until Monday, the 20th of October at eleven o'clock of the for noon.

Pursuant to adjournment, on Monday the 20th day of October, the hearing in this matter was resumed and the following questions were asked of CECIL BROWN:

Q. What amount is invested in mortgages on real estate?

91 A. The inventories filed show all the loans, the Trustees made no further loan.

Q. What interest upon mortgages is in arrears?

A. Mrs. Nawahi owes about four or five hundred dollars.

Q. Do you consider the work on the Emma Street residence, repairs or permanent improvements?

A. It was started in as repairs and became permanent improvements.

Q. Does the provision in the Will contained in the fourth paragraph thereof, "Shall maintain said residence buildings and grounds

in suitable condition and repair" at the charge to the estate, warrant the expenditure of $38,824.28?

A. Most decidedly, I think it does warrant it. The house would have fallen down and the family would have had no place to live in.

Q. When does your duty as Executor end, and when does your duty as Trustee begin?

A. When the accounts are approved and the decree of distribution is made. Our duties as Executrix and Executors may then terminate. Our duties as Trustees commence on the Probate of the Will. I contend that the duties are not divisible.

Q. Does not the sixth paragraph of this Will clearly and in express terms contain a devise to the Trustees, and what is the meaning of these words, "And those of them who shall be living at the date of such decree the rest, residue and not hereinbefore devised?

A. I do not think it does as the duties of the Executors and Trustees are one and the same things.

Q. Does not the second paragraph of this Will direct the payment to Mrs. Parker of the sum equivalent to one-third of the value of the personal property finally decreed to be the value of the personal property at the date of such decree?

A. It does.

Q. Does not the fourth paragraph give the right to use the
92 family residence under certain conditions and with certain restrictions?

A. It does, yes.

Q. Does not the fifth paragraph provide for the family maintenance by monthly allowance?

A. It does.

Q. Does not the fifth paragraph, and especially the last sentence, make it clear that the Trustees are not to enter upon their duties until after the decrees of distribution?

A. Not absolutely for the same reason as given thereinbefore. Take the Will as a whole, the devise is to the Executrix and Executors and Trustees and it was not the intention of the Testator to limit the powers of the Trustees and I refer to the eighteenth paragraph of this Will.

Q. Do you not think it advisable to have a guardian appointed for the infant children, Muriel and Mary.

A. I do not think a guardian should be appointed for Muriel and Mary, although I think perhaps it would be better to have a guardian. It would relieve the Trustees if a guardian were appointed.

There is now due on income to Muriel Campbell, a minor, the sum of	$22,166.38
There is due to Mary Beatrice Campbell, a minor, the sum of	22,166.38
The two minors have not been paid a cent, nor has any fund, or portion of the estate, been set apart for them. The portion of the income paid to Mrs. Parker required all the money. When the amount due the minors is set apart, with the excess paid to the Princess Kawananakoa, it will lessen the estate by	58,086.71

The Princess KAWANANAKOA, née CAMPBELL, upon being duly sworn, testified that she intended living at the Beach house,
93 that is the family residence, known as "Leahi," and "Myself and husband are willing to pay rent for the same."

JOSEPH O. CARTER was then duly sworn and testified as follows:

Q. What is the value of the "Leahi" property?
A. About $40,000.00.
Q. What would be a fair rental per month?
A. $200.00 per month.
Q. Should the estate pay the water rates?
A. Yes.
Q. Do you contemplate making any permanent improvements upon the residence at "Leahi"?
A. We do not. The body of the house is good, but it needs repairs.
Q. In making these repairs, is it the intention of the Trustees to call for tenders?
A. It is the intention to call for tenders, and the work will be particularly confined to repairs and not permanent improvements.

O. G. TRAPHAGEN upon being duly sworn, testified as follows:
I know the Campbell residence and was consulted by Mrs. Parker and the Trustees, Jos. O. Carter and Cecil Brown and I examined the building at the request of the Trustees. I found the under-pinning and support in bad condition. The verandas and steps were in bad condition; the building badly settled, the floors were out of level and the walls out of plumb. The plumbing was in a bad condition. The top part of the tower of the house was badly damaged by insects. These conditions were found to exist by an examination which was made without removing any of the construction or boarding.
94 There was no intention then to make more than repairs. The building was found to be in a much more damaged condition than was at first observed. Fred Harrison did the work. Tenders were suggested by the Trustees but I objected to it and recommended that the work be done by the day because it was impossible to make plans and specifications that would cover the exact amount of material required and work needed. My first estimate for the work was $12,000.00 but that was based upon a superficial examination.
The Dining-room of the house as I found it was dark and dingy and wholly unsuitable for a Dining-room and absolutely unfitted for a family like Mrs. Parker's.
The house as it stood could not have been repaired so as to accommodate eight persons. There were no unnecessary repairs made.
On account of rain the house had to be raised and earth put under it. This expense was not taken into account at first.

FRED HARRISON, Contractor and Builder, being duly sworn testified as follows:
I know the Campbell residence on Emma Street. My directions from the Trustees were to repair the building. Upon examination,

I found the building in an unsafe condition, as the foundation was rotten. There were heavy rains after the work was commenced and we had to raise the house and put in extra foundations; had to put in wider and heavier walls and also to fill under the house with earth. All the batons and studs were rotten. The tower was worm eaten and dangerous to life. The house was absolutely in an unsafe condition. A portion of that building was standing when I came here twenty-six years ago. I received as renumeration, ten per cent. on the cost.

95 The house as it stood could not have been repaired so as to afford suitable accommodations for Mrs. Parker and her family. If a new building had been put up instead of repairing the building as it stood, it would have cost $15,000.00 more than the amount expended upon it. The estate certainly got good value for their money. The work was done under the supervision of Mr. Traphagen.

JOSEPH O. CARTER, being recalled, testified that in his opinion there was no power under the fourth paragraph of the Will, given to the Trustees or Executors to rent the "Leahi" residence. The Will limits the occupation.

At the hearing held at my Office on the 25th day of October, A. D. 1902, Mr. Joseph O. Carter testified as follows:

I am Agent for Mrs. Parker. I get a fixed sum per year for transacting her business. She pays my compensation out of her own private income. I invest large sums of money for her from time to time.

The agreement for compensation between myself and Mrs. Parker is a private agreement. I have received and handled all Mrs. Parker's money. All the money she has received out of the estate, less the amount required for her private purposes was paid over to me for the purpose of being invested by me as her Agent, on her behalf and for her benefit.

I recommend that your Honor pass and allow the several items for the repairs and additions to the Emma Street residence, amounting in all to the sum of $38,824.88.

Under the fourth paragraph of the Will the Testator directs the Executrix and Executors to maintain said residence building and grounds in suitable condition and repair at the charge of the Estate.

96 It seems to me that the meaning of the Testator when he used the words, "To maintain said residence in suitable condition and repair" was and they ought to be interpreted in the light and with reference to the circumstances, that the residence houses should be kept in suitable condition for occupancy by his family, having due regard to their station in life and their circumstances.

II.

The buildings, I find under the evidence, were dangerous and unsuitable for Mrs. Parker and her children as a residence. The main building was unsafe for them to dwell in. The Will and the Law

impose this duty on the Executrix and the Executors and even if the Testator had only used the words, "To keep in repair," I think the expenditure would have been justified.

"It would be difficult, indeed," says Bouvier, "to define repairs." What a party is bound to do when the Law imposes upon him the duty to make necessary repairs, does not appear to be very clearly defined.

The word "Repair" has been held to mean "replace."

2 N. Y. 93.

The question of repairs and what are included under repairs most frequently arises between Landlord and Tenant and in construing a covenant in a Lease to repair, the word, "Repair," perhaps would not extend to improvements or to new buildings, but this Testator was providing for his wife and children a home, and abiding place, and it would in my opinion, indeed be a narrow interpretation of this Will that the words "In suitable condition and repair" used by him in the Will, should mean that they be compelled to live in a house having only two or three rooms, badly ventilated, dark and unsuitable for persons occupying their station in life.

97 The words used by the Testator, "In suitable condition and repair," it seems to me, are broad enough to include and justify this expenditure.

If the residence house had been burned, the Executrix and Executors, under the provisions of the Will, would have been bound to rebuild them and the erection of a small cottage, would not comply with the provisions of the Will or be in accordance with the directions of the Testator.

III.

It would have been better to have called for tenders for these improvements, but under the testimony I find that the Executrix and Executors acted in good faith and the estate got good value for the money expended.

It seems to me that no other conclusion under the evidence can be reached than that the expenditures were justified and that the several items should be allowed.

IV.

I recommend the carrying out of the directions in the Will as to these residence houses.

The harsh provision contained in the fourth paragraph of the Will depriving any of the children the right to live in the family residence on Emma Street and at Leahi, after their marriage, must be respected and carried out by the Trustees. Never-the-less, it seems to me that Mrs. Parker, during her life, has absolute control of both these residences and that the Testator intended that she, as head of the family, can invite and have under her roof in such residences, any person or persons, she may deem advisable to invite.

Neither of these residences can be rented under the provisions of the Will, therefore, no income can be derived from them and the

rights of the minors cannot be possibly affected by anything
98 that Mrs. Parker may do in connection with allowing guests, or other persons, to occupy rooms in either of these residences.

There are no restrictions upon her, it seems to me in this connection so long as the rights of the minor children are not interfered with.

V.

I have come to the conclusion, and recommend, that the principal of the estate should be surcharged with the sum of $43,798.32

It seems to me that under the peculiar provisions of this Will, the duties of the Executrix and Executors commenced upon the death of the Testator and end upon the Decree of Distribution being entered up and that the duties of the persons appointed Trustees begin, *if at all*, after the entering of such decree; and that the amounts paid to the

Princess Kawanauakoa to wit:	35,920.31
and which it is admitted is	13,753.94
too much, and to Alice Campbell	10,910.00

should not have been paid until after the Decree of Distribution, and it may be that the Executrix and Executors exceeded their powers in paying these amounts, but as I am satisfied that the Executrix and Executors acted in good faith and that the estate is intact, and while I recognize that the duties of the Executors and Trustees under a Will are separate and are not to be performed in the same capacity, I think the Executrix and Executors' request asking to amend their accounts, should be allowed.

VI.

Through a mistake of Cecil Brown, one of the Executors under the Will and a misconstruction by him of the provisions
99 of the Will, and since the filing of these accounts and upon this hearing, he has asked that the following amendment be made, which I recommend that your Honor permit under all the circumstances.

Sworn Statement of Cecil Brown, Esq., One of the Trustees under the Will of James Campbell, Deceased, Made Before George A. Davis, Esq., Master.

Through my mistake and misconstruction of the Will, and since the filing of the accounts, I have come to the conclusion that the Accounts as filed, in so far as the application of the income is concerned, have been erroneous, and I now ask that the accounts may be amended in order to cover the error made by myself in the misconstruction of the Will and application of the income. Under the terms of the Will Mrs. Parker was decreed to be entitled out of the personalty of the Estate to the sum of $357,741.91. To pay this, I now contend that the principal of the Estate only should be

called upon, and not the income. Taking that as a correct contention, we have principal on hand at the death of the testator the sum of $233,039.15. There has been Principal collected by the Executrix and Executors to July 31st of this year the sum of $113,197.84, making a total of actual Principal collected of $346,236.99. Of the sum collected since the death of testator there has been invested by the Executrix and Executors the sum of $32,293.40, as follows:

Balance of Assessment First National Bank Stock	$25000.
" " Haw. Hardware Co.	3125.
and Mutual Telephone Co. Stock	4168.40
	$32293.40

which deducted from the amount of Principal actually collected leaves a balance of $313,943.59, with which to pay Mrs. Parker one-third, making a deficit of $43,798.32. This deficit was
100 paid out of the income realized from the Estate.

The gross income realized from the Estate has been as follows:

Rents from Realty	$215,018.21
Income from Personalty	89,330.36
Other sources	4,287.08
Making a total of	$308,633.65

gross.

From these gross receipts should be deducted the following expenses:

Expense proper	$67,156.11
Allowance	40,950.
Homestead additions & alterations	38,824.88
Commissions	32,671.52
Making a total of	$179,602.51
and this leaves as income remaining the sum of	129,033.14

Out of this $129,033.14, Mrs. Parker has received on account of the sum decreed to be due her out of the personalty, $43,798.32, leaving for division as net income $85,234.82, instead of $129,033.14. Mrs. Parker was entitled to one-third from the realty, which amounts to $53,274.65. We have now from the above statement as follows:

Income 2/3 of the Realty, net	$106,549.30
Income from Personalty, net	84,733.85
Making in all	$191,283.15

From this income has been deducted the commissions due the Executrix and Executors. But the following items, expenses chargeable to Realty, should also be deducted.

Expense proper	$67,156.11
Allowance, etc	40,950.
Homestead additions, etc	38,824.88
Making altogether	$146,930.99

From this $146,930.99 should also be deducted the sum of $44,313.35, being a portion of the three foregoing items heretofore deducted from gross receipts of rents, to get at Mrs. Parker's one-
101 third of the net rental, showing the sum of $102,817.64 to be deducted from $191,283.15, leaving an income to be divided among the four children, say, $88,665.51. This gives the

interest of the Princess Kawanauakoa in the net income	$22,166.37
Alice K. Campbell	22,166.37
Muriel Campbell	22,166.38
Beatrice Campbell	22,166.29
Making	$88,665.51

But of this amount of net income, Mrs. Parker has received $43,798.32 to pay what is due her by decree of Court of her one-third in the Personalty, and there is also due her on account of the income from the Realty $20,000.00

I submit that the Principal of the Estate should be surcharged by this amount of $43,798.32, as under the terms of the Will, the devise of one-third of the Personalty to Mrs. Parker should be chargeable against the Principal of the estate, and not against the income; otherwise, there would be no income to be divided amongst the children, nor could the estate be settled up for some years. But, the Executors, under my advice, and for which I am responsible, paid the Princess $35,920.31, say $13,753.94 too much. Miss Alice K. Campbell has been paid on account of income $10,910.01, which was $11,256.36 too little. The two minors have been paid nothing, nor has any portion of the income from the estate been set apart for them, the reason being that the payment from the income to Mrs. Parker swallowed up the portion that belonged to or should have been set apart for them; or, in other words by having this amount charged against the Principal, and not taken from the Income, a fund will be available to be set apart to the minors.

VII.

It is submitted and contended by the Counsel appointed by the Court, F. M. Brooks, Esq., on behalf of the minor children, Muriel Campbell and Mary Campbell, Legatees under this
102 Will, that a guardian be appointed over them, but under the evidence and circumstances, I do not feel it my duty to recommend to your Honor that such guardian be appointed.

Mrs. Parker, the mother of both of these minor children, has displayed her competency to take care of and train up, and see that the rights of these children are fully and amply protected. The Mother, upon the death of the husband, is the natural guardian of her off-

spring and will, in most every case, do more for them than an artificial parent or protector that a Court of Equity or Probate may appoint. So long as this estate is in the hands of competent, impartial and honest men and under the supervision and close scrutiny of a Court of Equity or Probate, the conduct of the affairs of this vast estate will be carried on with diligence and ability.

The fund to be set aside for the minor children under the provisions of this Will, is one-fourth of two-thirds of the net income arising from the rents, issues and profits of the realty, and under the seventeenth paragraph of this Will, it is the duty of the Trustees, and they are bound, to furnish to each Legatee, during the month of January in each year, a complete and detailed account and statement of the receipts, expenditures, transactions, assets and liabilities of the estate of the Testator, for the preceding year, which shall be known as their Annual Report. A copy of such report shall be filed with the Hawaiian Court having Probate Jurisdiction and such accounts shall be subject to approval, modification, or surcharge of such Court, upon legal notice to all concerned.

With this safeguard, which the Will affords, and because the Mother of these children is one of the Trustees under the Will, I do not think it advisable that a stranger should be appointed solely for the purpose of receiving the income of these Minors during their minority; and for the further reason that when this fund is
103 set aside by the Trustees, it will be their duty, and the Court will see to it, that this fund is invested in first mortgage securities upon real estate having improvements thereon, or other safe securities, by the Trustees and thus, the reasons for the appointment of such guardian do not exist.

VIII.

I have carefully examined the Accounts and the several items of expenditure and I find them correct and recommend that they be passed and allowed.

IX.

It is the bounden duty of Executrix and Executors to carefully follow the directions and provisions of a Testator's last Will and Testament, and they shall not substitute their own judgment but shall seek the advice of Counsel, if there is ambiguity or uncertainty as to the meaning of the various provisions of such Will, but the provisions of this Will are very peculiar and the ablest Counsel could easily be misled and it is difficult, taking the Will as a whole, to conclude just what was the intention of the Testator, so that so long as the Estate is intact and the income arising from both realty and personalty has been fully protected and taken care of, a simple mistake, such as paying Mrs. Parker's share of the personal property out of the income, instead of out of the principal, can easily be remedied and adjusted and it is the bounden duty of the Trustees, as soon as they enter upon their duties, to set aside a fund providing for the minor children, to wit: the sum of $22,166.37 to Muriel Campbell and the same amount to Beatrice Campbell, which money should be

immediately invested by the Trustees, under the supervision of a Court of Equity, by first passing and approving the investments, and I do not think it out of place before concluding this report to say that their money should be invested in first mortgage securities in realty in Honolulu, upon which improvements have been made, and from which an income is derived.

104

The property of these minors should be carefully guarded and investments should be made with great care and caution by Trustees and others in the exercise of their functions.

X.

The Executors and Executrix must repay to the Estate of James Campbell the sum of $13,753.94
paid under an honest mistake to the Princess Kawanauakoa and so received by her as her share of and income from the Estate. Arrangements can easily be made to return the amount to the Executors and Executrix.

The sum of $13,753.94, paid to the Princess Kawanauakoa is disallowed.

XI.

The Balance claimed by the Executors and Executrix, of the sum of $14,869.69
is based upon the full payment of the entire amount due Mrs. Parker under the Will, in lieu of dower, which amounts to 53,274.65
but after the accounts were completed, it was found that the Estate was not in funds and the check which was drawn in favor of Mrs. Parker for 20,000.00
was not delivered to her, and there was, at the filing of these accounts, to the credit of the Estate 5,130.31
and I so find.

105

The amount due Mrs. Parker of $20,000.00
must be paid, and taking this balance, the sum of. 14,869.69
will have to be obtained and as under the provisions of the Will, the income is fully disposed of, I recommend that the Executors and Trustees be allowed by your Honor — take this from the principal of the Estate.

The expenses of Administration after the entering up of the Decree and the discharge of the Executors and Executrix will be lessened.

The balance to the credit of the Estate $5,130.31
and the amount overpaid to the Princess Kawanauakoa .. 13,753.94

shows a balance to the credit of the Estate of $18,884.25,
which amount I find is due from the Executors and Executrix to the Estate.

XII.

I recommend that the Accounts, as amended, be passed and allowed by your Honor, as a whole, and that the Executors and Ex-

ecutrix be discharged by a Decree and their bonds be cancelled when they comply with the provisions of this Will and your Honor is satisfied that they have done all that they are bound to do as such Executors and Executrix.

XIII.

I recommend that your Honor allow the Trustees to expend the sum of Two Thousand Dollars annually for the purpose of carrying on the business in connection with the management of the Estate by the employment of a Book-keeper and Collector and for other incidentals.

I consider that this recommendation should be acted upon, because in the management of such a large estate, there is necessarily a great number of claims to be collected which require speed and at-
106 tention.

I do not at all reflect upon the way in which the accounts of this estate have been kept; at the same time, the estate can well afford to pay Eighteen Hundred or even Two Thousand Dollars per year for such purpose, and the money will be well spent.

XIV.

I hereby, in addition to the recommendations herein contained, respectfully call the attention of this Court to the fact that the sum of Fifteen Hundred Dollars ($1,500.00) per month, for the maintenance of this family, seems to be inadequate, and it appears to me that there should be allowed, for family maintenance, in view of the value of the Estate, at least the interest upon one-half million dollars at six per cent., to wit: Thirty Thousand Dollars ($30,000.00) per year and that your Honor should so order before discharging the Executrix and Executors.

XV.

The expenditure by the Executrix and Executors of the sum of $500.00 for a legal opinion with reference to the liability of the Estate to pay a war revenue tax to the United States Government, seems at first sight to be an unjust and excessive charge, but the importance to the Estate and the large sum of money involved justified the Executrix and Executors in seeking the advise of able counsel, and under all the circumstances, I think the amount should be allowed.

I very much regret that I did not have the services of a Stenographer at the various hearings, but I have endeavored to present to your Honor such a Report as will enable you to pass upon these Accounts and the various matters connected therewith without difficulty.

Respectfully submitted.

GEO. A. DAVIS, *Master.*

Dated at Honolulu Nov. 5, 1902.

To the Honorable Geo. D. Gear, 2nd Judge of the Circuit Court, 1st Circuit.

107 (Endorsed:) In the Circuit Court of the First Judicial Circuit. Territory of Hawaii. At Chambers. In Probate. In the Matter of the Estate of James Campbell, deceased, testate. Master's Report. Filed Nov. 5, 1902, M. T. Simonton, Clerk. Geo. A. Davis, Esq., Master. Judd Bldg., Honolulu, H. T.

108 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Decision.

This is the final account of the Executors and Executrix of the last Will of James Campbell, deceased.

Many questions have arisen in regard to various matters which have required much labor and research and it has been necessary to go into the matter to some length in order to advise the executors as to their powers and duties.

The will is rather strange in some of its provisions and is a striking example of the extent to which under the present Territorial Laws a testator may tie up a vast estate for a long period. It ties up the principal of the estate until a possible period of 20 years after the death of all the living children of the testator, and gives no part of the vast estate to any living child, the income alone being disposed of. Such wills are not favored in law and it would be well if laws were passed here as in New York and some other states where two lives in being is the limit of time during which the fee may be suspended; or such as the laws of California, prohibiting a trust to convey.

The will is also peculiar in that there does not seem to be any present transfer of the fee of the realty, the executors being empowered simply "to reduce to possession" the realty, and manage and control it. There is no devise of the realty to the executors, who are
109 directed to "conclude the probate proceedings hereunder and obtain a decree of distribution of my estate" "at and upon the full payment and discharge" of the debtors and the legacy to the wife of a sum equal to one-third of the value of the personalty. After directing the conclusion of the probate proceeding and a distribution the testator says. "And I do give and bequeath unto the Trustees hereinafter named, and to those of them who shall be living and resident in the Hawaiian Islands *at the date of such decree*, all the rest, residue and remainder of my estate not hereinbefore otherwise given devised *of* bequeathed" in trust for certain purposes thereafter mentioned.

It may be a serious question as to whether there is any legal devise of the realty to any one, the testator evidently intending that there should be a decree of distribution and settlement in the probate court before the Trustees were to take. If the devise was intended to be a devise after distribution it would be a question as to whether or not it was a valid disposition, for if a decree of distribution was to be

made before the devise to the Trustees could be made effective, it would seem that it would be impossible to have the property administered on in the probate court.

A devise to certain persons of the remainder of the estate given them at the date of the decree of distribution is certainly inconsistent with and repugnant to a decree of distribution which must have been made and entered before it is ascertainable to whom the estate is distributed.

In other words the will directs the executor to "conclude the probate proceedings" and "obtain a decree of distribution." The very next words give and devise the residue of the estate (*i. e.* that which is left when final distribution is ordered,) to certain persons "living and resident" *here at the date of such decree.*

There must be a decree of distribution before the devise can be operative for the decree must *precede* the vesting of the de-
110 vise, and must precede the proof required before the decree can be made. There can be no "date of the decree" until the decree is made and there can in no case be any proof preceding the decree for until the decree is made there can be no date fixed which the will requires in order to ascertain to whom distribution is to be made. It is perfectly apparent from the will that the testator did not intend to give the property to the Trustees named until after distribution, for his executors are directed to "reduce to possession" all his estate, *real, personal and mixed*" and to manage, control, care for and collect the income and rents thereof pending the distribution thereof as hereinafter provided." They are then to conclude the "probate proceedings" and obtain a decree of distribution." Up to the "decree of distribution" they are to possess and control the property, and then it is given to such Trustees as may be living at the "date of such decree."

It is possible that the estate could never be administered upon in the probate court for it is not given to anyone until the date of the decree of distribution, and the decree of distribution being the judicial ascertainment of the right of distributees which must set out the names of all persons entitled to the estate, there must be proof made to the court as to who are entitled to the estate before the decree can be made. It is very apparent from the will that the testator did not intend to vest the title in the Trustees from the time of his death and the question then arises as to whether he could withhold the vesting until after a decree of distribution had been made.

This is a serious question, not for me to determine at this time, however. I shall state however that the will has made no provision for divesting the title of the trustees, if any they have, in the case of there being grand-children living at the date of the death of the last surviving child of the testator if all die before the expiration
111 of the 20 years thereafter. Provision is made for the transfer by the trustees of the estate to the legal heirs of the testator in case there are no grand-children of testator living at the death of the surviving child of the testator, and in case there are such grand-children living the "authority" of the trustees is to continue for twenty years thereafter, or during the lifetime of such children if

they should die within the twenty years. If they live until then the Trustees are to convey the estate to them at the end of the 20 year limitation, but if they die before the period of said twenty years then then "Authority" of the Trustees is to continue for such lesser time, as he, she, or they shall live, but in that case *there is no provision* as to a conveyance by the Trustees to any other party.

The will is divided into 22 sections, the first of which directs the executors and executrix thereafter named to take possession of all the property of the decedent and manage it and collect the income "pending the distribution thereof as hereinafter provided." They are also to have the court adjudicate the value of the estate.

The second section requires them to pay his debts.

The third section devises to his wife a sum of money equivalent to one-third (⅓) of the sum at which the personal property is valued. It provides, that "such sum shall be paid in cash, and if the conditions and interests of my estate shall not warrant the payment of the entire sum hereby contemplated at one time, then my Executrix and Executors shall pay the same as rapidly as the income and interest of my estate shall permit, without the sale of any real estate or sacrifice of any personal property as a means of raising such sum, but provided that the entire sum shall be paid within two years from the date of my decease, and no deferred payment shall within said period of two years draw*ing* interest.

112 The fourth section provides for the use of the Emma Street and Leahi premises as a family residence.

The fifth section directs the executors and executrix to pay a family allowance, as directed by the court, and then provides that "the Trustees herein provided for from and after their entry upon their functions of trust hereunder" shall make further provision for the maintenance of the children.

The sixth section provides that "at and upon the full payment and discharge of the obligations and bequest contemplated in paragraph numbered respectively second and third hereof I will and direct that my Executrix and Executors shall, as soon as may be, conclude the probate proceedings hereunder and obtain a decree of distribution of my Estate. And I do give devise and bequeath to the Trustees hereinafter named and to those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest residue and remainder of my estate, etc. in trust for certain purposes set out in sections following.

The seventh section relates to the residence houses and directs the trustees to allow them to be used as in section four and thereafter to partition them.

Section eight provides that "with respect to all property which shall be so distributed to them other than the residence houses, the Trustees shall reduce it to their possession, manage and control it, collect the income and investing any and all moneys, and keep separate accounts of real and personal estate.

By the ninth section the Trustees shall from and out of the net income, and profits of the realty pay one-third to the testator's wife in semi-annual or more frequent payments."

The tenth section provides "And the remaining two-thirds" of the net income and profit of the realty during the wife's life and "the entire sum thereof" after her death, "shall be by my said
113 Trustees included in one fund with the net income and revenue of and from all my estate other than such realty" and "such fund shall by them at intervals of not more than six months, divided into as many equal parts as there shall be then *in esse* any of my children by my said wife, and shall be by said Trustees paid to my said children, from and after their respective majority or marriage share and share alike. It is not necessary to take the other sections.

The Executors and Executrix in their account charge themselves with the sum of $698,873.10, and ask to be credited with the sum of $709,742.79, leaving a balance of $14,869.69 due them. They have inserted many items in the account which as executors they were not authorized to pay out, which will be noticed more in detail hereafter, but considering them now collectively the question arises as to whether they are authorized under the will to act as Trustees until after final distribution of the estate and their discharge as Executors and Executrix.

The will nominates the Executors and Executrix as residuary legatees in trust and appoints them *eo nomince* as Trustees. They have acted as if they held the estate in these two capacities at this time and their accounts cover transactions attempted to have been done in both capacities. Probably because the two capacities were united in the same persons they have thought they held the estate in both of such capacities; and their accounts could only be sustained on that theory.

The accounts consist of so many items and charges created by them in the capacity as Trustees that another and new account will have to be filed if it is held that their two capacities are separate and distinct. The question then arises as to whether they now do or at any time have held the estate as trustees as well as executors and executrix. It seems to me from a reading of the will that the two
capacities are separate and distinct. As executors they had
114 the duty of administering the estate only, which includes the payment of Mrs. Parker's legacy, family allowance, debts and expenses of administration. Upon performing these duties they would be discharged as executors and the property would be distributed to them as residuary legatees in trust, at which time they would take the property as Trustees, and not until then. It will be seen from the records that they have only been appointed executors and executrix, and their bonds are given only in that capacity. In fact their final account is that of "Executors and Executrix of the Last Will and Testament" of decedent. They have never been appointed Trustees by order of court and from the nature of the case cannot assume their offices as such until distribution. The fact that the different offices are united in the same persons does not change the rule, and only upon discharge as Executors can they take as Trustees. They will then have to give a new bond in

that capacity, and their present bond will be discharged. There are many decisions to this effect of which I can only cite one or two.

Where the executors named in the will are also residuary legatees in trust the two capacities are distinct.

"As Executors they are directed by the first clause of the will to pay the just debts of the estate and funeral charges * * * The trust fund created by the seventh clause of the will is of "all the rest, residue and remainder of my estate" after the satisfaction of the prior provision, which embrace, as stated, the payment of debts and sundry pecuniary legacies. As Trustees, the plaintiff's hold only such of the estate as remains after the legal charges against it are paid. *As trustees they have no concern with the administration of the estate.* This duty relates only to the trust fund,—what remains and comes to their hands under the trust clause upon due administration. *That the same persons are both executors of the estate and trustees of the residuary fund does not co-mingle the duties* of the two portions, *or confer upon them in either*
115 *capacity greater authority than would be possessed if the respective portions were held by different persons.*"

Carr *vs.* Paul's Parish 51 At. Rep. 920.

"The office and functions of administrators and guardians are separate even where held by the same person."

Guardianship of Long, 7 Haw. 371.

"After full consideration of the general and statutory law relating to this case and the policy and reason of our entire probate system, our conclusions as applicable to large estates may be summarized as follows:

"First. *Executors*, when qualified as such, *are subject to the jurisdiction of the* district *court, sitting* in the exercise of its *probate* powers.

Second. The duties of such executors are to proceed with the performance of their executional duties, as imposed upon them by the laws of the state, having due regard to the will of the decedent.

Third. Executors must account, and *executorial responsibilities can only terminate after compliance with the statutes, and after a settlement, approved by the court*, has been made, *and after a distribution* and delivery up have been ordered by the court.

Fourth. *Where trust duties are imposed upon trustees as devisees* and legatees *under a will such duties cannot properly be assumed by the same persons who were named as executors* under the will, *and who have qualified as such executors, until the court has approved their accounts, and ordered a distribution of the estate.*"

Estate of Higgins 28 L. R. A. 126-7.

"An order of distribution alone cannot discharge executors until the estate is distributed.

Id. p. 124.

Cranson *vs.* Wilsey, 71 Mich. 356.

The duties of executor and trustee are separate and distinct

and where the same person is executor and trustee he must as
116 executor settle his account and be discharged and give bond as trustee.

Gary Prob. Law, Sec. 741.
Crosswell Exr. Sec. 725.
Wooden *vs.* Kerr, 91 Mich. 188.
Cranson *vs.* Wilsey, 71 Mich. 356.
Wilson *vs.* Wilson, 17 Ohio St. 150.
Probate Court *vs.* Angell, 11 R. I. 495.
Probate Court *vs.* Hazard, 13 R. I. 1.
Parsons *vs.* Lyman, 5 Blatch 170.
Anderson *vs.* Earle, 9 S. C. (N. S.) 460.
Deering *vs.* Adams, 37 Me. 264.
Williams *vs.* Cushing, 34 Me. 370.
Crocker *vs.* Dillon, 133 Mass. 91.
White *vs.* Ditson, 140 Mass. 351.
Daggett *vs.* White, 128 Mass. 398.
Muller *vs.* Congdon, 14 Gray 114.
Sheffield *vs.* Parker, 158 Mass. 330.
Prier *vs.* Talbot, 10 Cush. 1.
Newcomb *vs.* Williams, 9 Met. 525.

Devise to Mrs. Parker.

$357,741.91.—Amount paid Mrs. A. K. C. Parker as the sum of money equal to the value of one-third of the personalty, should all have been paid from the principal of the personalty, and not from the income.

This sum of money is given to the widow as a part of her estate in lieu of dower, and is a direct legacy which by the rules of law should be paid out of the personalty.

The executors by a report filed subsequently to their ac-
117 count have recognized this and now ask to have their account amended to conform with this rule. The testator himself recognized this for he has expressly stated in his will that the executors are to have two years to pay this amount, the legacy not to draw interest in the mean time. If it were not for this provision it would be due as of the date of the testator's death and would draw interest from that time. The payment I find to be proper but find that it should all be charged to principal of the estate.

Income Paid Mrs. Parker.

$53,274.65.—The executors have charged the sum of $53,274.65 as the income due Mrs. Parker and have obtained this amount by taking the total income from the realty from the death of testator amounting in all to $215,918.21, deducting $55,194.26, being expenses chargeable to realty as they have determined them and the balance of $159,823.95, they have divided into thirds and have found that Mrs. Parker's share is $53,274.65.

This amount has been paid Mrs. Parker as her portion of the in-

come arising while the estate is as yet in the hands of the executors of the estate.

Was this payment authorized by the will?

It will be seen from the will that by the first paragraph the executors are to take possession of the estate "and to manage, control, care for and collect the income and revenue thereof pending the distribution thereof as hereinafter provided:"

After distribution of the property to the trustees they are directed by paragraph eight of the will to reduce it to possession, "and to collect all rents, issues, profits, income and revenue thereof" and then paragraph nine provides "And from and out of the net in-
118 come, rents, issues and profits of and from the realty last aforesaid, said Trustees shall pay the equal one-third part or portion thereof in semi-annual or (at the discretion of said Trustees) more frequent payments, to my said wife, for and during the remainder of her natural life."

From a hasty reading of the will it would seem as if this payment of the income from the realty was not authorized by its terms, and there seems much force in the argument that the eighth and ninth paragraph- of the will only cover the income arising after the estate is distributed to the trustees and that the income accruing prior thereto is not disposed of specifically.

But taking the whole will together it seems to me that its language covers all the income of the estate. The widow is given by the will one-third of the personalty or rather its cash value and then one-third of the income of the realty for life. This is exactly her right of dower and is to be taken by her "in lieu and full satisfaction of her dower." Now it does not seem plausible that the testator intended that the provision in his will was not to be equal to her dower right in his estate. If however the eighth and ninth paragraphs restrict her right to the income *arising after the executors become trustees* then the estate taken by Mrs. Parker would be an estate less valuable than her dower by the sum paid of $53,274.65, and which now amounts to much more.

Testator could not have had such a thought in his mind for he could not expect Mrs. Parker to take such a great amount off the estate allowed her by law for the purpose of tying it up in trust for persons yet unborn and unknown heirs who may take the estate 30 or 40 years hence.

While it seems from the will and I must so hold that the executors as such had no authority to pay out this money to
119 Mrs. Parker still it seems to me that the will gives Mrs. Parker her one-third of the net income of the realty from the time of the testator's death and not only from the time of the Trustees taking possession of the estate.

If the income could be kept from Mrs. Parker which accrued during administration of the estate by the executors, then the executors might by merely postponing settlement of the estate and failing to qualify as trustees until compelled so to do, deprive Mrs. Parker of a large sum of money.

A consideration of these propositions seems to lead to the con-

clusion that it was clearly the intention of the testator to give his wife at least her dower right in the estate; but I have also reached the same conclusion from the words of the will which fully cover this income.

It will be remembered that the executors are to take possession of all the estate, and "collect the income and revenue thereof pending distribution," then;

"At and upon the full payment and discharge" of testator's debts and the sum bequeathed Mrs. Parker, the executors are to have the estate distributed to themselves as Trustees in trust among other things to take possession of the estate and;

"To collect all rents, issues, profits, income and revenue thereof" and then follows this paragraph:—

"Ninth. And from and out of the net income, rents, issues and profits of and from the realty last aforesaid, said Trustees shall pay the equal one-third part or portion thereof" etc.

It will be seen that this "net income" from the realty is not limited to the "net income" collected as trustees. The same parties as Executors collected the "net income" of this same realty, and as distributees, will take it in trust. It will then still be a portion of the "net income" of the realty and as Trustees they are directed that "from and out of the net income rents issues and profits
120 of and from the realty" they "shall pay the equal one-third part or portion thereof" to Mrs. Parker.

It seems to me that it would be necessary to interpolate into the will words limiting the "net income" to that accruing after the Executors have qualified as Trustees, in order to so construe it. "An equal one-third" of "the net income" of the realty, is one-third of the net income from the date of testator's death.

If this is not the correct interpretation of this will then Mrs. Parker would be much better off to have her dower assigned. Even if she had made her election before this it would not bind her if given under a misapprehension of the true interpretation of the will.

At the time the property was valued for the purpose of appraising it to determine the sum due Mrs. Parker as the value of one-third of the personalty there had been quite a sum collected as income from the realty which the master refused to take into account in making his computation on the ground that Mrs. Parker would receive her one-third of the amount under the will as income from realty. If now it be denied her she will, instead of being paid twice, lose it altogether.

It seems to me clear however that Mrs. Parker is entitled to the third of the net income from the realty *from the time of her husband's death*, but I think that the payment of the money to her was premature. She is to be paid by the trustees and not by the Executors. The whole is, after payment of the debts and her one-third of the personalty, to be distributed to the Trustees, who are to follow certain directions of the will. If the payment of this sum of $53,274.65 is approved it would follow that it has never been distributed under the will. It must be first finally distributed to the Trustees and then paid by them to Mrs. Parker.

It should appear in the account therefore as cash on hand, and be paid out by the Trustees after the administration proceedings
121 are closed. As executors they had no right to make the payment and they will therefore be surcharged with the sum of $53,274.65.

In this connection it will not be out of place to call attention to the fact in making up the new accounts that this sum will be changed when items charged to realty are deducted which should be charged to other accounts as appears elsewhere in this opinion.

Since writing the foregoing I have found several cases which uphold the above conclusion, based on reasoning almost identical with that above expressed.

Where a will gave a widow the income of the residue during widowhood she is entitled to the *whole of the income* of the personal estate *from the death* of the testator and not from the time the estate is settled in the probate court, and a codicil which says that "after the settling of my estate, my wife (shall) have the interest of the remainder of my personal estate" does not fix the date of the title but only defers the time of its enjoyment.

Pollock *vs.* Learned, 102 Mass. 55 quoting Lamb *vs.* Lamb, 11 Pick. 371, the court saying,

"No interest or income is given to anyone else and no intent is manifested to let the personal estate accumulate for the benefit of those in remainder." But by the construction contended for, the estate might be kept unsettled by the pendency of suits and other contingencies, and necessarily so, during the whole life of the widow, and the favorable intent of the testator in her behalf, be wholly defeated."

Lamb *vs.* Lamb, 11 Pick. 371.

Cestuis for life are entitled to the whole income.

When executors settle the estate they should pay over the income accruing until settlement to the trustees, and *their account should distinguish between capital and income.*

Ex parte Bailey, 13 R. I. 543.

Where a will devised two-fifths of the residue of a deced-
122 ent's estate after payment of debts and specific legacies in trust for the use of his daughter for life, remainder over, the court held that she was entitled to the rent and income accruing between the date of the testator's death and the distribution of the estate, the court saying:

"It is well established that where there is a bequest of the whole or of an aliquot part of the residue of an estate, to a legatee for life, remainder over, and no time is fixed by the will for the commencement of such life use, *the legatee is entitled to the* use or *income of the clear residue*, so bequeathed, *as the same may be at last ascertained, to be computed from the death of the testator; is entitled to the income which may accrue during every moment of life subsequent to the moment when the will becomes an operative instrument*, unless it places some limitation upon such

enjoyment." Citing 1 Jarman on Wills 4 Am. Ed. side p. 547, note; Williamson *vs.* Williamson, 6 Paige 298; Lovering *vs.* Minot 9 Cush. 151; Cooke *vs.* Meeker, 36 N. Y. 15; Bartlett *vs.* Slater, 53 Conn. 106, Pollock *vs.* Learned, 102 Mass. 54; Angerstein *vs.* Martin, Turn & R. 234.

Lawrence *vs.* Security Co. 15 At. Rep. 409.
55 Conn. 423-439, 1 L. R. A. 342.

"The main question in the case arises under the seventh clause of the will, which reads as follows: "The rest and residue of my estate of every kind I give to the Security Company of said Hartford, in trust for the following uses and purposes, viz: To take and have the entire management of the same, with power to sell, invest and re-invest the same at its discretion, and in such securities as it shall deem for the best interest of said estate; and *I direct said trustee to pay over the net income semi-annually*, during her life, to my said daughter, Mary H. Bancroft, *the first payment to be made six months after the trust fund shall be paid to said trustees* by my executors."

* * * * * * *

"One of the important questions in the case is whether
123 plaintiff is entitled under the will to the income from the death of the testatrix or only from the date when the estate was turned over to the defendant by the executors; and the answer to this question depends upon the further question whether the will itself fixes the time when the life use of the plaintiff commences, for, if it does so, the will must govern. The will does not, in express terms, fix such a time, but the defendant claims that the provision that the income shall be paid semi-annually, and that the first payment thereof shall be made in six months after the estate shall have been turned over to the trustee, read in the light of the record in this case, does fix such time by necessary implication; and that the time so fixed is the date when the estate was turned over to the trustee. We think this is not so. Giving to the provision in question all the weight to which — is justly entitled, we think it fixes, and was only intended to fix, the time of payment of income, and not the time when the right to income should vest. The express words of the will are: "I direct said trustee to pay over the net income semi-annually during her life to my said daughter", and these words, standing alone, constitute a clear gift to the daughter, during her life, of the entire net income from the death of the testatrix. By them said entire net income is disposed of to the daughter, and to no one else. They define and describe the gift, *the* added *words, fixing the time of* the first *payment of income*, and thus in effect, the time of all subsequent payments, *ought not to be so construed as to cut down the extent of the gift* UNLESS THEY ARE SUSCEPTIBLE OF NO OTHER REASONABLE CONSTRUCTION. We think they are susceptible of a construction other than that contended for by the defendant. The construction contended for by the defendant would give to the plaintiff during her life only a part of the income accruing after the death of the testatrix, and to the remainder-men another uncertain,

and perhaps large, part thereof, depending on the time ex-
124 pended in the settlement of the estate. Reading the will, in the light of the record, we think it expresses more clearly an intent to give the daughter, during her life, the entire income accruing after the death of the testatrix, than it does an intent to divide it between her and the remaindermen, and that the more clearly expressed intent should prevail. We think the will cannot be fairly regarded as fixing the date of the reception of the estate by the trustee as the time when plaintiff's life use begins, and incline to regard it as fixing the date of the death of the testatrix as such time; but, if this last is not so, then at most the case is one where the will has not fixed the time for the commencement of the life estate, and in such case the general rule applicable in such cases must govern. That rule is that, where there is a bequest of the whole or of an aliquot part of the residue of an estate to a legatee for life, remainder over, and no time is fixed by the will for the commencement of such life use, the legatee is entitled to the use or income of the clear residue so bequeathed, as the same may at last be ascertained to be computed *from the death of the testator*. Lawrence *vs.* Security Co. 55 Conn. 423-439, 15 Atl. 406, 1 L. R. A. 342. Bartlett *vs.* Slater 53 Conn. 102-106, 22 Atl. 678, 55 Am. Rep. 73.

Bancroft *vs.* Security Co. 50 At. Rep. 736-737.

Under a will by which all the residue and remainder of the testator's estate is given to trustees, in trust to pay over and distribute the income to and among his five children, one-fifth to each, during their respective lives, with remainder over, such children are entitled to their respective proportions of the income of such residue *from the decease of the testator*.

Syllabus in Lovering *v.* Minot, 9 Cush. 151.

The will after giving certain pecuniary legacies to the executors in trust gave to the trustees, "all the residue and remainder of my
125 estate" but "in trust to take care of and manage said estates, to take the rents, income, interest and profits thereof and after deducting all necessary and reasonable expenses and charges for the care and management of said real and personal estate, and incident to the execution of the trusts created in this will *to pay over* and distribute *the net rents, income*, interests and profits thereof *to* and among *my* five *children*", naming them *"half yearly or oftener*, if convenient to said trustees &c." then over, with special and detailed directions.

The Court said: per Shaw, C. J.

"Under this will the court are of opinion that the *plaintiff is entitled to one fifth of all the income which accrued upon the residuum of the fund* FROM THE TIME OF THE DECEASE OF THE TESTATOR. "And although it could not be immediately paid over, because the executors could not know how much would be wanted, and what the residue would be, yet the accounts when afterwards made up, would show what part of the income accrued from capital and what part from income accumulated, and then the income due to each would be ascertained.

"We think, therefore, that when the funds were transferred from the executors to the trustees, the assets showing what was received from income and what from capital, *it was the duty of the trustees to distribute that part of it which was composed of interest* and retain the amount of capital as it existed at the decease of the testator, as the capital sum, constituting the residue, to be invested and held under the trust.

"There has been some conflict of authorities on this subject." (citing cases) But the latter cases have settled it the other way, as we think, quite decisively. (Citing cases)

"And those cases seem to the court to have decided the question upon just principles.

"It is a question between the first *cestui que trust* for life and the remainder man. The effect of a different decision would be
126 to apply the first year's income to increase the capital; to take it from the first taker and apply it to any accumulation for the benefit of the future taker.

It is contrary to the presumed intent of the testator, to narrow the benefit intended for the FIRST OBJECT OF HIS BOUNTY, *for the benefit of an object now remote.* Besides the words of the will are "the income" with nothing to restrain them and make them include anything less than the whole income."

Lovering *v.* Minot, 9 Cush. 151, 156-7, approved in Pollock *vs.* Learned, 102 Mass. 55; 2 Williams on Executors, p. 1492.

This case last cited seems to me directly on all fours with the case at bar.

The will in the case in Massachusetts gives to the executors "all the residue and remainder of my estate real and personal * * * not bequeathed or devised in this will * * * but in trust nevertheless for the intent, uses and purposes as follows, * * * in trust to take care of and manage said estate, to take the rents, income, interest and profits thereof, and after deducting all necessary and reasonable expenses and charges for the care and management of said real and personal estate * * * to pay over and distribute the net rents, income, inter-
127 est and profits thereof to and among my five children, * * * one-fifth to each during their respective lives, half yearly or oftener, if convenient

The will of decedent gives to the executors, "all the rest, residue and re- estate not hereinbefore otherwise given, devised or bequeathed * * * but in trust nevertheless for the uses and purposes hereinafter expressed * * * to reduce it to possession, and to hold, manage, control, preserve and direct it and to pay all costs and discharges thereof. * * *

"And from and out of the net income, rents, issues and profits of and from the realty * * * said Trustees shall pay the equal one-third part or portion thereof in semi-annual * * * or more frequent payments to my said wife for her life.

"And the remaining two-thirds of the net income, rents, issues and profits of and from

to said trustees," their remainder over.

The trustees are then given full powers as to investment sale, etc.

The will empowers the Trustees to "make partitions and divisions of the estates and property held by them * * * and may authorize the several parties for whose benefit said trusts are created to take the income and profits of their respective shares. * * * the representatives of any deceased child or children shall take the share to which his, her, or their deceased parent or parents would have been entitled, if living."

said realty, during the natural life of my said wife and after her death, the entire net sum thereof shall be by my said Trustees included in one fund with the net income and revenue of and from all my estate other than with realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than six months, divided into as many equal parts as shall be then *in case* any of my children by my said wife, and shall be by said Trustees paid to my said children, from and after their respective majority, or marriage, share and share alike; Provided, that if any of my said children shall decease leaving lawful issue, such issue shall stand in the place or places of his, her or their parent or parents in all respects concerning the division, payment and receipt of the fund herein mentioned."

128

The case at bar falls directly within the rule announced in the Massachusetts case. As said by the latter court "the words of the will are "the income" with nothing to restrain them, and make them include anything less than the whole income." There is certainly no provision or word in the will in question which "restrains" the words here. The will says "And from and out of the net income, rents, issues and profits," one-third is to be the widow's "And the remaining two-thirds of the net income, rents, issues and profits of and from said realty" during the widow's life, and after her death "the entire net sum thereof shall be by my said Trustees included in one fund with the net income and revenue" of the personalty & said fund "shall be" divided into as many equal parts as there shall be children "*and shall be* by said Trustees *paid to my said children* from and after their respective majority or marriage."

There is not a word in the will which by any allowable construction limits this "net income" to that arising after a decree of distribution shall be made.

It appears here as in that case that "there was (is) an abundance of personal property to meet the debts and pecuniary legacies." And it follows here as in that case that "the *cestui que trusts* to whom the income from the decease of the testator" (9 Cush. 156.)

Even where the words of the will were that "*after the settling of my estate my wife shall have the interest of the remainder* of my

personal estate" the court held that this did not fix the date of the title but only defers the time of the enjoyment, and that she was entitled to the whole of the income from his death and not from the time the estate is settled in the probate court.

Lamb *vs.* Lamb, 11 Pick. 371, quoted in Pollock *vs.* Learned, 102 Mass. 55.

129 As in that case so here "no interest or income is given to any one else" and "by the construction contended for the estate might be kept unsettled * * * during the whole life of the widow" and children and the "intent of the testator * * * wholly defeated."

The trustees' duties as to the widow are to pay her one-third of the net income of the realty, not of only so much as may accrue after distribution of the estate. The net income from the realty is what accrued since the decedent died, and not merely that part of it accruing after the decree of distribution. The executors have recognized this by paying to the widow her third since testator's death. But they have inconsistently paid the children only their share of the income accruing after they became of age. There is nothing in the will to authorize this. The mere fact that it is to be paid to them "from and after their majority or marriage" does not debar them absolutely from the income accruing prior to their becoming of age, but merely postpones its payment until that time. It is in the nature of any other legacy which is to be paid when a child becomes of age. The provision that it is to be paid to the child when it become of age, merely postpones its payment. Each child becomes entitled to its equal share of the fund when it is ascertained, subject however to its becoming of age or being married, its *payment* however being deferred till after that time when it "shall be by said Trustee paid to my said children."

When the Trustees take possession of the property they are required to immediately pay over to the children who are of age their interest in the income. And that includes the income from the time of the testator's death. If before becoming of age any child should die its interest would become a part of the principal estate, because of the provision that any surplus revenue remaining should so go, but to attempt to construe this as divesting the children of all their income and giving them nothing when they become of age would be to construe it against the immediate taker and in
130 favor of some still unborn remote remainder-man, which the law says should not be done. The interest in the whole income having by express mandatory words ("shall be paid") be given to the children it would require some express words of limitation to divest them of it, and such a clause should be strictly construed against such a divestiture.

The words "any surplus revenues" could not have that effect but should be construed as evidently intended, as meaning "surplus revenues" remaining upon the death of any child before attaining majority. If of the four children living at the time a division was made one should thereafter die, then under this paragraph "surplus reve-

nue" would remain which would become a part of the principal of the estate. Any other construction would take away the right of the children to the payment to them when they arrived at majority of any sum whatever, and they would have an interest only in what revenues should accrue thereafter, the intermediate revenue going to some remote as yet unascertained heirs.

Such a construction is not favored in law.

As, however it must be held that the executors and executrix are not authorized by the will to pay out of the income, the whole residuary estate being left to them in trust, the amount of the income which shall be paid Mrs. Parker is not now properly before this court and the court can only inquire as to whether the payments made by the executors and executrix was proper. On this point I have come to the conclusion that the payment was unauthorized and therefore I surcharge them with this amount, to wit, $53,274.65.

Income Paid Princess Kawananakoa.

$35,920.31.—This is the amount paid Princess Kawananakoa as her *her* share of the income of the real and personal property.

The master reports this payment as made "on account of income from January 1st, 1901, to July 31st, 1902." (p. 4 of Master's Report) and that she has been paid more than her income."

131 He reports that she "has been paid $13,753.94 in excess of what she is entitled to under the provisions of the Will."

The executors' accounts show that the total income from the realty from the date of decedent's death to July 31, 1902, was	$215,018.21
That the expenses chargeable to realty were	55,194.26
Leaving a net income of	$159,823.95
If Mrs. Parker under the will and the law is entitled to her 1/3 of this income or	$53,274.65
for the same reasons the quarter of the balance of	106,549.30
or the sum of	26,637.32
is the portion to which Princess Kawananakoa would be entitled out of the realty.	
In addition to the income from the real property which as above seen is	$26,637.32
the executors have shown from their account that the gross from the personalty is	89,330.36
The expenses so far as shown are 5% commissions on this income which makes	4,466.50
This leaves a net balance from the personalty of	84,863.86
Of this income the trustees are to divide it into 4 parts and pay to the children after their majority. This would give the Princess	$21,215.96
which added to the sum of	26,637.32
would give her	$47,853.98

Having been paid already	35,920.31
there would be due her the difference, or	$11,933.67

132 Instead therefore of the Princess having been paid too much as shown by the supplemental report of Mr. Cecil Brown and found by the Master to be the sum of $13,753.94
she is entitled to more than she received by $11,933.67

making a difference in her favor of $25,687.61

These figures are taken from the "Recapitulation" and I have followed the "Method taken to arrive at Income" as set out therein excepting to take the whole net income from the death of decedent as a basis of computation instead of from the date the children attained their majority. If they are entitled to anything now the Princess is entitled to her portion of the income from the time of the testator's death instead of from the date she became of age. The Trustees are to pay Mrs. Parker her share of the income from the realty during her life, and are to take the balance of the income and divide into four parts and pay it to the children after they become of age. There can be no question in so far as the Princess and Miss Alice Campbell are concerned that they both being of age will stand in exactly the same situation as Mrs. Parker, in so far as their right to their share of the whole net income is concerned. The same rule of law which allows her the third of the net income from the realty as her $53,274.65, accrued before the Trustees take possession of the estate, and during administration thereof, applies equally as well to the princess and Miss Alice. As to them there can be no "surplus remaining in the hands of the trustees for both being of age they are entitled the moment the trustees take the property to their shares of the income. If this were not so they would be entitled to nothing when the trustees assumed their office but would have to wait until income accrued under the trustees. There can be no other legal construction of the will and under the authori-

133 ties cited giving the income from the date of the testator's death where no time is fixed for its commencement they are clearly entitled to this *income which accrued from the date of the testator's death.* The *whole of the income is the subject of the sentence* requiring it to be divided into as many parts as there are children, and which "shall be by said Trustees paid to my said children from and after their respective majority or marriage share and share alike. The subject is 2/3 of the net income of the realty "during the natural life of my said wife and after her death the entire sum thereof" "included in one fund" with the whole of the net income from the personalty, and "such fund" shall be divided into parts and paid to the children from and after their majority and marriage. It is not limited to the income *accruing* after their majority or marriage, but it is the "fund" which is to be paid at that time. Not a fixing of the date the income shall commence to accrue but the date of its *payment.*

I have stated the amount the Princess would be entitled to be paid if she were now entitled to be paid anything, but I will be forced to surcharge the whole sum paid by the executors and executrix on the ground that it was not one of their duties to pay this out until they assumed their offices as trustees. At that time however the Princess will be entitled to a credit of her share of the income accruing since testator's death instead of only since she became of age and after marriage and if the figures of the executors are right she will have a credit of $11,933.67, instead of being charged with $13,753.94, overpaid her. This will be the amount up to July 31st, 1902. I will have to surcharge the executors and executrix however with the whole amount paid, viz: $35,920.31.

Income Paid Miss Alice Campbell.

$10,910.01.—The account shows the payment to Miss Alice Campbell of the sum of $10,910.0 .

134 The Master reports that Miss Alice "has not been paid in full" and that she is entitled to $11,256.36, more than has been paid her."

This is based on the assumption that Miss Alice is entitled to the share of the income duly from March 17, 1902, the date she became of age.

The executors in their "Recapitulation" have in their "Method taken to arrive at income" treated her as they did the Princess, allowing her however her share from a later period she having arrived at her age at a later date.

The same reasons and the same rule of law applies to her as applies to Mrs. Parker and the Princess.

As the executor's accounts show that the net income from the realty from Mr. Campbell's death was the sum of	159,823.95
and have allowed Mrs. Parker her 1/3 or	53,274.65
Miss Campbell is entitled to 1/3 of balance of	$106,549.30
which would leave as due her the sum of	$24,637.32
as her share of the net income of the realty up to July 31, 1902.	
From the personalty the gross income is	$98,330.36
Deduct from that the 5% commission or	$1,466.50
and the balance of	$84,863.86
is to — divided into four parts one of which would be	$21,215.96
135 This would give Miss Alice her share of the income from personalty of	$21,215.96
added to her 1/3 of the 2/3 of the net income from realty or	$26,637.32
making a total sum to which she is entitled of	$47,853.98
instead of	$10,910.01
which she was paid, leaving a balance due her of	$36,943.97
instead of only	$11,256.36
as reported by the executors and found by the Master,	
or a difference to her of	**$25,687.61**

This stands on the same footing however with Mrs. Parker-$53,274.65, and the payment to the Princess of $35,920.31. Not only is the amount due Miss Campbell over $36,000, less than she has received, but the executors had no right to pay her anything until they assumed their offices as trustees. While therefore from the figures given in the account she would be entitled to the additional sum of $36,943.97, due as of July 31, 1902 the payment of the sum can be made only by the trustees, and the executors will therefore be surcharged in this account with the $10,910.01, already paid her.

Commissions Due Trustees.

$32,671.52.—The amount charged as commissions due "Trustees" should be surcharged *in toto* in so far as it is rendered as due "Trustees," for they have not yet qualified and there having been no property come into their hands they are not entitled to any commissions. In no event can the charge be more than the commissions allowed by law on what has been actually received and paid out. They have charged $10,880.91 on the income from the
136 realty. This was charged on the gross income collected and should be allowed to them as executors and executrix.

They are also entitled to commissions for cash on hand at decedent's death and for the payment of any principal. If this payment of commission should be considered as paid to them as executors and executrix it should have deducted from it the commissions charged (if any) on the following items:

Mendonca Bonds	$40,000	(Exchange)
Mrs. Parker	$53,274.65	(Income)
Abbie Kawananakoa	$35,920.31	"
Alice Campbell	$10,910.01	"

This item will be corrected in accordance with the foregoing in the new account, as it cannot be correctly figured out until the account is correct.

"Expenses Proper."

$67,156.11.—This amount charged as "expenses proper" consists of items charged to realty amounting to $55,194.26, debts of the estate and expenses of administration, amounting in all to the sum named. These are not segregated and it is impossible to tell from the accounts how much are proper chargeable to principal and how much chargeable to income, so that it is impossible to find out what is the net income of the personal estate.

All the debts of the estate and expenses of administration should be charged to the principal of the personal property and not to its income, there being sufficient principal out of which to pay them.

Testator's will provided that after the payment of debts and sundry legacies the executors shall as trustees take "all the rest residue and remainder of my estate" in trust, paying the income to cer-

tain legatees, and providing that certain stock be held intact
137 as long as they deemed best. The trustees sought a decree authorizing them to divert some of the income to the payment of debts, so as to hold the principal intact. This the court refused to do, holding that "*the income of the trust fund cannot be applied to the extinguishment of charges against the estate.*"

"*Between an augmentation of the trust fund by the retention of a portion of the income and its investment and its like enlargement by the application of the income to the payment of debts to meet which the* CAPITAL IS PLEDGED *there is no distinction in law or in fact.* In either case, the fund would be increased by the retention, instead of the expenditure, of the income."

Carr *vs.* St. Paul's Parish, 51 At. Rep. 920. (N. H.)

"When a testator does not direct the funds out of which his debts are to be paid as between a tenant for life and remainder-men of the estate they are chargeable *not on the income but on the* CORPUS *of the estate as it* EXISTED AT THE TESTATOR'S DEATH."

Gilliam *vs.* Valdwell, 11 Rich. (S. C. Eq.) 72.

The fee of the estate is made primarily liable to the payment of the debts where the testator has not appropriated any particular fund for that purpose.

Duncan *vs.* Tobin, Ind. Eq. (S. C.) 161.

Expenses of administration are chargeable upon the *assets* of a decedent's estate.

Appeal of Watson, 3 Walk. (Pa.) 216.

Rents are not assets for payment of debts.

Appeal of Rolb, 41 Pa. St. 45.
First Nat. Bank *vs.* Hanna, 39 N. E. 1054.
Kidwell *vs.* Kidwell, 84 Ind. 224.

Expenses of administration include "all sums which have been paid by the executors in the course of a faithful and prudent ad-
138 ministration, such as the expense of appraising the estate, of collecting the effects and paying the debts, of attending the probate and other courts upon business of the estate, of advertising as required by law or any order of the court, the sums paid for legal and other necessary assistance."

Smith's Probate Law, p. 206.

Where the widow has a direct interest in the income of an estate as an annuitant, counsel fees paid by the executors in an action against the widow to recover assets of the estate should be charged to the *corpus* of the estate and not to the income.

Bonney *vs.* Haydock, 40 N. J. Eq. 513-4, at Rep. 766.

On exceptions to an executor's account, a counsel fee awarded an annuitant should be paid out of the *corpus* of the estate.

Id.

The debts of the estate should be paid out of the principal of the estate and not out of the income.

Appeal of Vanderford, 12 At. Rep. 491.

Though personal property is first liable for the payment of debts if it is made the subject of a specific legacy it should not be taken for the payment of the debts if there are other funds. The law will respect the testator's intention so far as is consistent with the rights of creditors, and the assets may be marshaled in that manner by the court.

Smith's Probate Law, p. 168-9.

The following are some of the items of expense which should be charged to principal of the estate as included in funeral expenses and costs of administration.

Voucher 1.	Hacks at Funeral	$24.00
" 2.	Typewriting will, etc.	12.00
" 3.	Flowers	25.00
" 4.	Lilienthal S. T.	.25
" 5.	Court costs probate	25.00
139		
" 6 & 7.	Livery for funeral	26.00
" 13.	Express flowers funeral	3.00
" 25.	Kalana hack	6.00
" 5.	Ex. Prob. Will	105.00
Voucher 32.	Ex. Prob. Will	58.67
" 48.	Appraise, etc.	25.00
" 57.	Notice to creditors	7.50
" 66.	Master's fee	150.00
" 67.	Costs Master's Report	7.50
" 70.	Kinney gdn.	500.00
" 72.	Holmes & Stanley	500.00
" 81.	Exp. appraising	5.00
" 82.	Lilienthal Pub. ad.	250.75
"	Abstract for Ex.	.25
" 132.	Monument	3,381.75
"	Exchange on monument	10.15

Rental San Jose Property.

$3,310.35. This — an amount consisting of two items one of $2,598.10 received April 2 on account of rental of San Jose Property, and $712.25, received on Nov. 3, 1901, from the same source. This is the rental, or some of it, of the property inventoried as "St. James Hotel, San Jose, Cal." and decreed by the Judge of this court on Sept. 21st, 1900, to be valued at $150,000. This being real estate in California would be governed by the laws of that state as to wills and under the laws of the state it would form no part of the estate disposed of by will. *The will, while made in California, is void under the laws of that state* and the property would descend as in a

case of intestacy. It seems to me therefore that neither this
140 property nor the proceeds thereof can properly be administered on under this will or be taken by the trustees. Even if it was the desire of the widow and children who are now of age the interests of the minor children should be protected.

In California the Supreme Court held by a decision rendered March 1902, that "a trust in real property created by will for the benefit of the children of the testator during their lives, and thereafter *to convey* to certain beneficiaries named, contained a void trust to convey, and that such void trust defeated the trust scheme of the testator and rendered the entire trust during the lives of the children invalid and void."

Estate of Fair, 136 Cal. 79, quoting *Id.* 132 Cal. 552.

A similar trust in personal property created by the same will is also invalid, and must fall with the defeat of the trust scheme.

Id.

The will in the above cited case contained a similar provision to that contained in the will in question and is invalid and void as to both the real and personal property situated in California.

It appears from the evidence of Mr. Cecil Brown taken before the Master that the executors have not reduced this San Jose property to their possession, (in which they are perfectly right) but it seems strange that they should have collected some of the rents, however.

Family Allowance.

$40,950.00.—The sum allowed for family support should be
charged to principal and not to the income from the personal
141 property. While perhaps at first blush it may seem that the family allowance should come out of the income of the estate it is seen upon a study of the question that the amount allowed should come out of the principal of the estate and not out of the income.

In this Territory there is no statute allowing the probate court to grant a family allowance and the only right in this case, if any, is by virtue of the testator's will. By the will the Executors are directed to pay Mrs. Parker "for the use of herself and our children as a family allowance, such sums, monthly, as may from time to time be approved and decreed by the Court having jurisdiction of the probate of this will."

This direction to pay a family allowance is in the same language as the direction to pay debts of the testator, and in the states where it is allowed by statute it has preference over the debts.

An act was introduced in the last legislature to allow Probate Courts to award family allowances, but it never became a law. As the court had no such power at common law it can only make the allowance when authorized by will. In such a case the allowance is in the nature of a legacy, and should be paid from the principal or *corpus* of the estate and not from the income. In many states it is provided by statute that an allowance can be made from the

income but in the absence of such a statute or a direction in the will to pay it out of the income it is paid either as one of the expenses of administration or as a legacy, in either of which cases it is payable out of the principal of the estate. The residuary estate is that left after payment of this allowance, all legacies, debts and costs
142 of administration. This allowance lasts only during probate proceedings and upon their conclusion is deducted with other charges and debts from the principal, and the balance is the residuary estate so far as the corpus of the estate is concerned.

"A legacy is a disposition of personal property by last will and testament. *This includes annuities* and *provision for support.*"

18 Am. & Eng. Encycl. of L. 2nd Ed. p. 710.

"A direction in a will to the executor to support the testator's aged father in sickness and in health is a legacy for which an action *his* against the executor," per syllabus, the court saying:

"The direction to support and maintain the plaintiffs results from the bounty of the testator declared in his will, and must be considered as to the remedy as a legacy. It is made the duty of the executor in his official character to furnish this support and maintenance *out of the estate* of the testator in his hands."

Farwell *vs.* Jacobs, 4 Mass. 634.

Even where allowed by statute an application for a family allowance is "similar to an application for a partial or final distribution of the estate or the payment of a legacy."

Estate of McCausland, 52 Cal. 576.

Where a statute provides for a family allowance to the widow it "gives her a credit for the necessaries of life at once" and the right thus given is as full as the right of any distributee to the assets remaining for distribution after an estate has been settled."

Bratney *vs.* Curry, 33 Ind. 400.

"The provisions, money and other personal property set apart under the statutes of the several states for the support of the widow and dependent children during the period intervening before they come into possession of dower or distributive share are also paramount to the claims of creditors of the decedent. The liability of the administrator in this respect, is purely statutory, as
143 this species of protection to the surviving family is known to the common law. * * * It takes precedence of "ordinary expenses of last illness, funeral expenses or charges for settling the estate."

Woerner Am. Law of Adm. Sec. 363.

"It has already been noticed that the power of testamentary disposition is limited, in some respects, by the policy of the law which places certain rights beyond the caprice of a testator. One of these is the right of the surviving members of his family to the necessary means of subsistence, raiment, and shelter during the period immediately succeeding his death, which the law enforces not only against any inconsistent testamentary disposition, but equally against cred-

itors, heirs and distributees, whose rights, like those of legacies, are controlled by and postponed to the provisions made for the surviving family in this respect.

Those provisions, like the kindred subject of exemption laws, are of purely American origin. * * * The common law secures to the — her dower and to the widow and children their *pars rationabilis* (Corresponding as to dower and distribution under American statutes), but no provision whatever is therein found to meet the exigencies arising immediately upon the death of the head of a family, save, perhaps, the clause in *Magna Charta* securing to the widow the right to remain in her husband's capital mansion for forty days after his death, within which time her dower was to be assigned." * * * These provisions for the protection of the family * * * *depending wholly upon the enactments of the several legislatures* they vary greatly."

Id. Sec. 77.

In New Hampshire, where a testator left certain legacies and devised the remainder in trust two-fifths for the life use of his daughter, remainder over, and the probate court made an allowance to her for her subsistence during the settlement of the estate, the
144 Court held that she was entitled to two-fifths of the interest, rents and income accruing after the date of the testator's death, and before distribution, and that *the* sum paid as a *family allowance "is one of the expenses attending settlement"* of the estate, (p. 11) and that *it should not be considered as a part of* or deducted from the income paid the life tenant.

Lawrence *vs.* Security Co. 15 At. Rep. 409.

"Homestead Repairs."

$38,824.88.—The amount it cost to put the homestead on Emma Street in suitable condition should be charged to the principal and not to income.

Testator has placed his residence houses and grounds on a different footing from his other property, for he has provided that his wife and children shall, during his wife's life, have the free use and occupation of these two places and all personalty thereon, "as and for a place and places of family residence." He then provides that his "Executrix and Executors, or the trustees appointed hereunder as the case may be, shall maintain said residences, buildings and grounds in suitable condition and repair, at the charge of my estate, during the life of my said wife, and thereafter while all my then living children shall be entitled to reside therein." After his wife's death and the marriage of any of his children, "expense of such maintenance and repairs shall be borne by" the children entitled to occupy the premises.

At the termination of the free use and occupancy of the residence houses and personalty, they are to be partitioned between the children and the issue of any deceased child.

The Master has found from the evidence taken by him
145 that the Emma Street buildings were "dangerous and unsuitable for Mrs. Parker and her children as a residence," and that the expenditure of this amount was necessary and justified.

The evidence of the contractor was that the building was "in an unsafe condition, as the foundation was rotten."

The house had to be raised an- extra foundations put in and wider and heavier walls built. "All the batons and studs were rotten. The tower worm eaten and dangerous to life. The house was absolutely in an unsafe condition. A portion of that building was standing when I came here twenty-six years ago." He further says: "The house as it stood could not have been repaired so as to afford suitable accommodations for Mrs. Parker and her family."

The evidence of the architect is to the same effect.

The finding of the Master is amply sustained by the evidence, in so far as the reasonableness of the expenditure goes, but it seems that the Executors have charged the sum to the income of the estate instead of to the principal.

It seems to me that this was error, for it reduces the income devised, instead of taking it out of the principal, which would otherwise become a part of the residuary estate.

The testator gives to his wife and children his "residence houses" which they are entitled to in "suitable condition and repair." At the time of his death the residence houses are in bad condition and dangerous, and yet *upon his death* the family are entitled to these house- in "suitable condition and repair." If the expense of so putting them in "Suitable condition" in the first place
146 is not chargeable to the principal of the estate then if the estate should have the income applied in other ways the wish or express desire of the testator might never be carried out. It is certain that if — took over $38,000 to put one of the houses in "suitable condition" to live in, with the other house also needing repairs, to cost a large sum, and these sums should be paid out of the income instead of the principal then the devise of the use of these houses in "suitable condition and repair" could not be carried out until surplus income had accrued enabling it to be so paid. But the family were entitled to the use of these houses in "suitable condition" from and after testator's death, and the only way they could get them in such shape was by taking money from the principal of the estate which was not directly devised but went into the residuary legacy.

If the amount is charged to income it would reduce the income to be divided among the children, whereas if it is charged to the principal it comes out of the residuary estate, and under settled principles of law devises and legacies are not subject to abatement if there be a residuary estate.

The amount $38,824.88, charged to income, for "homestead additions, etc.," is allowed and approved, but should be charged to principal account, and must therefore be credited to income account.

"*The necessary expense of putting a house in a good condition* to be leased *is a charge upon the principal fund; that of keeping it in repair is to be deducted from the income.*"

Parsons *vs.* Winslow, 16 Mass. 361.

89

147 *Investments.*

$32,293.40.—Investments of the balance due on stocks should be charged to principal, as they are paid only on the theory that the contract of the decedent made the future instalments in reality a debt for which the estate was liable. It should not have been paid out of the income and should be charged to principal. The income account should therefore be credited with $32,293.40 charged to it, and the principal account debited with the like amount, and credited with stock of that value in place of the money.

Ripley *vs.* Sampson, 10 Pick. 373.

At the hearing the guardian *ad litem* contended that a guardian should be appointed for the minor children to look after their interest, and to this all parties consented.

It seems to me that in view of the fact that the interest of these minor children may conflict with the interest of the trustees, especially as to the San Jose property, it will be necessary to appoint a guardian over them. This will be done, but the guardianship restricted the property of the minors and not to include guardianship of the persons. It will be the duty of the guardian to protect the minor's interests in the property which does not become subject to the will.

The executors are ordered to forthwith file an amended account to date in accordance with the above views which account as amended will be set for hearing and passed on on Monday the 22nd of June, 1903, at 10 o'clock, to which date the hearing of the petition for final distribution, is hereby ordered continued.

GEAR, *J.*

June 12, 1903.

(Endorsed:) Circuit Court First Circuit. In the Matter of the Estate of James Campbell, deceased. Decision. Filed June 12, 1903. Henry Smith, Clerk.

148 In the Circuit Court of the First Judicial Circuit. In Probate. At Chambers.

In the Matter of the Estate of JAMES CAMPBELL, Deceased Testate

Notice of Appeal and Appeal.

And now come Abigail Parker, Cecil Brown and J. O. Carter the Executrix and Executors under the will of James Campbell late of Honolulu, deceased testate, by their attorneys Holmes & Stanley and give notice of appeal and hereby do appeal to the Supreme Court of the Territory of Hawaii from the decision of the Hon. George D. Gear, Second Judge of the Circuit Court of the First Circuit, sitting

at Chambers, filed in the above entitled matter on the 12th day of June, A. D. 1903.

ABIGAIL PARKER,
CECIL BROWN, AND
JOSEPH O. CARTER,
Executrix and Executors,
By Their Attorneys, HOLMES & STANLEY.

Honolulu, June 16th, 1903.

The above appeal is hereby allowed.

_____,
2nd Judge, Circuit Court, 1st Judicial Circuit.

June 17th, 1903.

(Endorsed:) P. 3404. Cir. Court of 1st Circuit. In Probate At Chambers. 21 18. In the Matter of the Estate of James Campbell. Notice of Appeal & Appeal. Received $—. Filed Jun- 17 1903 J. A. Thompson, Clerk. Holmes & Stanley, Mer. St. Att'ys for Executrix & Ex'ors. Est. of James Campbell.

149 SCHEDULE C.

Executor's, Administrator's, Guardian's or Trustee's Account.

Final Account of A. K. Campbell-Parker, Executrix, and J. O. Carter and Cecil Brown, Executors of the Will of James Campbell, Deceased.

The Executrix and Executors charge themselves with the following sum as per Schedule A.....	$354,503.34
hereto annexed and asks to be allowed the following sum as per Schedule B, hereto annexed.....	$214,434.71
Balance	$140,068.63

We hereby certify that the foregoing account, and the Schedules marked A and B, hereto annexed and the vouchers herewith produced and filed, are full, true and correct statements of all sums received and paid out by us, or in our behalf, as said Exe'trix and Executors up to and including the 19th day of June, A. D. 1903.

J. O. CARTER,
CECIL BROWN,
Executors Last Will and Testament of James Campbell, Deceased.

Sworn to and Subscribed before me this — day of June, A. D. 1903.

[SEAL.] GEO. L. BIGELOW,
Notary Public.

(Endorsed:) Circuit Court First Circuit. In Probate. Estate of James Campbell, deceased. Final Accounts of Executrix and Executor. Filed the 29th day of June, A. D. 1903. F. H. Loucks, Clerk.

150 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Clerk's Minutes.

Vol. 1, p. 30.

In the Matter of the Estate of JAMES CAMPBELL, Late of Honolulu, Oahu, Deceased.

This day came on to be heard the petition of Abigail K. Campbell, J. O. Carter and Cecil Brown, Executors, praying that the estate of said James Campbell be finally valued and appraised and that a day be set for said hearing, and that W. A. Kinney, Esq., be appointed guardian *ad litem* of the children of said deceased, they being minors: Cecil Brown, Esq., appearing in behalf of the petition and no appearance being made by any one in opposition thereto.

The petition having been read and filed, the Court orders that Saturday the 18th day of August, 1900, at 10 o'clock A. M. at the Court House in said Honolulu be and the same is hereby appointed for the hearing of said petition; and further orders that W. A. Kinney, Esq., be and he is hereby appointed guardian *ad litem* of the minor children, to wit: Abbey Campbell aged 17 years, Alice Campbell aged 16 years, Muriel Campbell aged 9 years and Beatrice Campbell aged 5 years to represent them and their interests in the valuation and appraisement of said estate, that copy of this order be served on said W. A. Kinney and said minors forthwith.

Done at Chambers this eighth day of August A. D. Nineteen Hundred.

R. D. SILLIMAN,
Second Judge.

151 Vol. 1, p. 35.

In the Matter of the Estate of JAMES CAMPBELL, Late of Honolulu, Oahu, Deceased.

This day came on to be heard the petition of the Executors under the Will of decedent praying that the property of decedent, be finally determined and appraised: Cecil Brown, Esq., one of the Executors, appearing for said petitioners: Henry Holmes, Esq., appearing for the widow; and W. A. Kinney, Esq., guardian *ad litem* of the minor children, appearing in person:

The Court, after hearing the evidence adduced, appoints Royal D. Mead, Esq., referee, to examine the accounts filed and to report upon the same within ten days.

Done at Chambers this eighteenth day of August, A. D. Nineteen Hundred.

R. D. SILLIMAN,
Second Judge.

Vol. 1, p. 45.

In the Matter of the Estate of JAMES CAMPBELL, Late of Honolulu, Oahu, Deceased.

Come on to be heard this day the report of Royal D. Mead, Esq., Master herein; Messrs. Cecil Brown and Jos. O. Carter, Executors, representing themselves; Henry Holmes, Esq., appearing for the widow; W. A. Kinney, Esq., appearing for the minors; the Court after hearing arguments of counsel confirms the report of the Master and allows the Master a fee of $150 allows W. A. Kinney a fee of $500 and allows H. Holmes $500 and holds that the $33,988.80 is not to be included in the amount of the personal property, one third of which is to be given to the widow;
152 and finds that the total value of the personal property to be $1,048,017.69 plus $9,336.15 and the $15,871.90 making a total valuation of $1,073,225.74 of which the widow is entitled to one third.

Done at Chambers this thirty-first day of August A. D. Nineteen Hundred.

HUMPHREYS,
First Judge.

153 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Clerk's Minutes.

FRIDAY, *April 21st, A. D.* 1905.

At Chambers.

Present: Hon. Alexander Lindsay, Jr., Second Judge Presiding; Wm. R. Sims, Clerk; G. D. Bell, Stenographer.

In Probate at 9:35 A. M.

Vol. 1, p. 129.

In the Matter of the Estate of JAMES CAMPBELL, Deceased

Supplemental Final Accounts of Executrix and Executors.

W. L. Stanley of Holmes and Stanley appearing as counsel for Executors and Executrix.

J. J. Dunne for Princess Kawananakoa, and Messrs. Cecil Brown & J. O. Carter, Executors in person.

On motion of Mr. Stanley, the Court orders the above accounts referred to Wm. R. Sims, as Master for examination and report.

Mr. Brown makes statement as to Commissions chargeable upon Final payment of funds in Petitioners hands.

SATURDAY, *May 13th, A. D.* 1905.

At Chambers. In Probate. 9 A. M.

Present: Hon. A. Lindsay, Jr., 2nd Judge, Presiding; W. R. Sims, Clerk.

Vol. 1, p. 143.

Final Account Executors.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Hearing on Master's Report.

The Court orders continuance till May 15th, 8:45 A. M.

154 MONDAY, *May 15th, A. D.* 1905.

At Chambers. In Probate. 8:50 A. M.

Present: Hon. A. Lindsay, Jr., 2nd Judge Presiding; W. R. Sims, Clerk; G. D. Bell, Stenographer.

Vol. 1, p. 144.

Final Account of Executors, etc.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Hearing on Master's Report Cont. from 5/13/05.

W. L. Stanley, Esq. appearing as counsel for Executrix and Executors.

Messrs. J. O. Carter and Cecil Brown being present in person.

J. J. Dunne, Esq., appearing on behalf of Princess Kawananakoa.

Mr. Stanley presents and reads Report of Master.

Mr. Brown presents argument with reference to question of payment of commissions to Executrix and Executors upon full payment of balance of cash on hand.

Mr. Dunne offers to submit authorities on point and Court orders continuance of matter till Monday May 22, 1905 9 A. M.

MONDAY, *May 22nd, A. D.* 1905.

At Chambers. In Probate. 9:15 A. M.

Present: Hon. A. Lindsay, Jr., 2nd Judge, Presiding; W. R. Sims, Clerk.

Vol. 1, p. 149.

Final Acc't Executors.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Master's Report.

W. L. Stanley appearing for Petitioners.

155 The Court orders continuance till moved on.

TUESDAY, *June 20th, A. D.* 1905.

At Chambers. In Probate. 9 A. M.

Present: Hon. A. Lindsay, Jr., Second Judge; W. R. Sims, Clerk.

Vol. 1, p. 176.

4th Supplemental Final Account of Executrix and Executors.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Hearing Further on Master's Report.

Henry Holmes, Esq., appearing as counsel for Executors and Executrix.

Messrs. J. O. Carter and Cecil Brown Executors in person.

The Court orders Final Account approved in conformance to Master's Report which is confirmed. The Executrix and Executors will be discharged and Bonds cancelled upon filing proper receipts of devisees under the Will for property of said estate. The Trustees will be requested to give a bond in sum of $125,000. Order signed upon presentation. Master is allowed a fee of $250.00 for his services.

156 Circuit Court, First Circuit. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Petition for Approval of Accounts, Etc.

To the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit:

The petition of Abigail K. Campbell-Parker, Joseph O. Carter and Cecil Brown, respectfully represent to the Court, that they are respectively the Executrix and Executors under the last Will and Testament of the late James Campbell, deceased under bonds of One Hundred Thousand Dollars, and are also by the terms of the said Will appointed Trustees of said Estate.

That herewith they present and do file their third Account as Executrix and Executors, being an account of the services rendered said estate from the 19th day of June 1903 to and including the 31st day of December, 1903, and ask to have such accounts examined and approved, and upon such examination and approval, ask to be discharged as such Executrix and Executors, and pray that their duties as Trustees under said Will be ordered to commence forthwith, and that the distribution of the property now in their possession as Executrix and Executors as aforesaid, be distributed under the terms of said Will to these petitioners as Trustees thereof.

And these petitioners further represent and allege that heretofore,

to wit: on the 25th day of August, 1902, they filed their accounts as Executrix and Executors and praying for discharge and dis-
157 tribution, and the hearing thereon came on to be heard before the Hon. Geo. D. Gear, who duly referred such accounts to George A. Davis, Esq., Master, who made his report thereon, which report has been duly filed and is now of record in the proceedings herein.

That after the hearing of said Master's report, the Hon. George D. Gear, Second Judge of the Circuit Court, before whom the said proceedings were pending filed a decision thereon, which decision, it is respectfully submitted, was in the main *obiter dicta*, and not responsive to the petition of these petitioners, that their accounts be examined and approved, and that they be discharged and distribution made.

That thereafter these petitioners being unable to obtain any further hearing or a distribution of the estate remaining in their hands as such Executrix and Executors, did on the 29th day of June, 1903, file a further and supplementary account of their proceedings, and surcharged themselves as directed by said Hon. Geo. D. Gear in the decision given aforesaid, which said supplementary accounts included a period commencing on the 1st day of August, 1902, and ending on the 19th day of June 1903, and which accounts were also taken up for hearing by the said Hon. Geo. D. Gear at his own instance.

And these petitioners further represent and allege that said last mentioned accounts are still pending and unheard, and that it has been impossible to obtain a final or any hearing thereon. That the said Hon. Geo. D. Gear has been requested at different and divers times to pass upon the said first and second accounts heretofore filed, and to make distribution of the estate now in the hands of your petitioners, so that they could assume and perform the duties of Trustees under the Will; that notwithstanding such requests the said Hon. George D. Gear has failed, neglected and refused to take up said first and second accounts so filed as aforesaid, and
158 finally pass thereon, or to do or take or have any proceedings heard for that purpose. That the failure to hear and pass upon said accounts is impeding, delaying and preventing your petitioners from performing the duties required of them as Trustees under the terms of said Will, and is preventing the distribution of the income accruing to the beneficiaries thereof. That all the duties required of your petitioners as Executrix and Executors have been fully performed and complied with.

And these petitioners further allege that the said Hon. Geo. D. Gear has gone to San Francisco, and has failed to have said accounts transferred to a Circuit Judge of the First Circuit for hearing and determination; that the further delay in hearing and passing upon said accounts does and will prevent your petitioners from performing their duties, and is injurious to the interests of said estate and the beneficiaries thereunder. That these petitioners do not know when the said Hon. Geo. D. Gear will return and resume his duties as Judge as aforesaid.

Wherefore your petitioners pray that the accounts heretofore filed and those now filed may be examined and approved, and that dis-

tribution of the estate now in their hands may be ordered to be made, and that the Bonds given may be cancelled, and that such further and other orders may be made with relation to the estate of the said James Campbell as may be meet and proper in the premises.

ABIGAIL K. CAMPBELL-PARKER.
CECIL BROWN.
J. O. CARTER.

Dated, Honolulu, January 2nd, 1904.

159 TERRITORY OF HAWAII.
City of Honolulu, Island of Oahu, ss:

On this 4th day of January, A. D. 1904, personally appeared before me J. O. Carter and Cecil Brown, a majority of the Trustees and Executors under the Last Will and Testament of James Campbell, deceased, and made oath and said that the foregoing petition is true of their own knowledge, except as to such matters as are therein stated upon information and belief, and as to those they believe them to be true.

CECIL BROWN.
J. O. CARTER.

Subscribed and sworn to before me this 4th day of January, 1904.

[SEAL] GEO. L. BIGELOW,
Notary Public, in and for the First Judicial Circuit.

(Endorsed:) Circuit Court First Circuit. In Probate. In the Matter of the Estate of James Campbell, deceased. Petition for Approval of Accounts, etc. Filed Jan. 4, 1904. P. D. Kellett, Jr., Clerk. Cecil Brown, Att'y for Ext'x & Executors.

160 SCHEDULE C.

Executor's Administrator's, Guardian's or Trustee's Account.

Account of A. K. Campbell Parker, J. O. Carter and Cecil Brown, Executrix and Executors of the Last Will and Testament of James Campbell, deceased.

The Executrix & Executors charge . . . with the following sum as per Schedule A.....	$373,341.92
hereto annexed and asks to be allowed the following sum, as per Schedule B, hereto annexed.....	$127,524.94
Balance.....	$245,816.94

We hereby certify that the foregoing account, and the Schedules marked A and B, hereto annexed and the vouchers herewith produced and filed, are full, true and correct statements of all sums received and paid out by us, or in our behalf, as said Executrix and

Executors up to and including the 31st day of December, A. D. 1903.

ABIGAIL K. CAMPBELL PARKER.
CECIL BROWN.
J. O. CARTER.

Sworn to and Subscribed before me, this 4th day of Jan., A. D. 1904, by Cecil Brown and J. O. Carter.

[SEAL.] GEO. L. BIGELOW,
Notary Public.

(Endorsed:) P. 3404. 21 18. Circuit Court First Circuit. In Probate. Estate of James Campbell, deceased. . . . Account of A. K. Campbell-Parker, J. O. Carter & Cecil Brown, Executrix & Executors. Filed the Fourth day of January, A. D. 1904. P. D. Kellett, Jr., Clerk.

161 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

Supplemental Account of Executrix and Executors.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Master's Report.

The following report is respectfully submitted to this Honorable Court upon the Supplementary Accounts of A. K. Campbell Parker, Cecil Brown and J. O. Carter, Executrix and Executors of the last Will and Testament of James Campbell, deceased, filed January 4th, 1904, and covering period dating from June 19th, 1903, to December 31st, 1903.

Reference has also been made to preceding account filed June 29th, 1903, by Executrix and Executors owing to relation of items, and in compliance with order of this Honorable Court such matters as I have deemed to be in error in both accounts are recommended for correction.

The Executrix and Executors charge themselves with the sum of	$373,341.92
as per Schedule "A" as follows:	
Balance on hand as shown at time of filing last accounts (June 19th, 1903)	39,963.66
Items surcharged as per last accounts	100,104.97
Rents	47,446.98
Interest	33,169.31
Principal	149,319.00
Miscellaneous	3,338.00

162 The certificate embodied in Schedule "C" of these accounts sets forth these sums as having been received up to Dec. 31st, 1903.

The Balance shown by accounts June 19, 1903, was..	$140,068.63
In this statement said Balance is shown to be.....	$39,963.66
The difference is accounted for in the item of.....	$100,104.97

surcharged as per Supplementary Account. This sum of $100,-104.97 has not been received and stands in the same position as when originally paid out to Mrs. Parker, Princess Kawananakoa and Miss Alice Campbell. The vouchers therefor being held as a lien on the shares due said parties upon final distribution by the Executrix and Executors.

Rents $47,466.98 accounts for rents collected during the period.

In this connection the attention of the Court is respectfully directed to the fact that no rental has been collected for the office occupied for the transaction of business by Mr. Cecil Brown and the Executrix and Executors of the Estate since the demise of Mr. Campbell April 21st, 1900; a period of 44¼ months. I am of the opinion that the Estate should receive revenue for this office. Three offices of like size and location are rented at $90.00 per month each by the Estate and in order to bring the matter to issue I recommend that the Executrix and Executors be charged with the sum of $3,990.00—44¼ months rent at $90.00 per month.

Interest $33,169.31 correctly represents amount of interest on Investments collected during period.

Principal $149,319.00. This item is made up as follows:

163

1903.

June	22. Received from Fred Harrison for one Counter sold in Waterhouse & Co.....	$35.00
July	1. Sale of about 50 feet land boundary of I. O. O. F. and Campbell Estate.....	264.00
	18. Hackfeld & Co. on account their note.....	25000.00
	23. H. M. Von Holt, Tr., paid account mortgage.	1500.00
August	5. Old cottage sold on Hotel Street to rebuild...	20.00
	28. Commissions J. O. Carter account sale of $40,000.00 Young Hotel Bonds.....	400.00
Sept.	15. M. P. Robinson, paid his note in full.....	96100.00
Oct.	6. O. H. & L. Co. their note due Oct. 1, 1903....	5000.00
	31. Liliuokalani, her note in full.....	21000.00

Referring technically to the legal right of the Executrix and Executors to charge commissions upon all of these items, the Hackfeld note $25,000.00 and Liliuokalani note $21,000.00 are not sums actually received, but exchanges for other evidences of property as shown in Schedule "B." This matter will also be considered under commissions.

Miscellaneous items collected $3,238.00 cover certain water rates and taxes paid by the Estate and subsequently refunded by tenants.

The Executrix and Executors ask to be allowed the sum of	$127,524.98
as per Schedule "B" as follows:	
Expenses chargeable to Realty	20,080.76
Expenses account Principal	90,000.00
Allowance	9,000.00
Homestead repairs	617.25
Miscellaneous Expenses	157.00
Expenses chargeable to Interest	7,669.97

I have carefully checked items of statement comprising Schedule "B" together with accompanying vouchers and
164 find as follows:

1903.		
Aug. 12.	N. Fernandez Notary fees *re* San Jose Property	$1.50
" 12.	3 Certificates. Clerk of Court—*re* Notary to Power of Attorney Trustees. Mrs. A. K. C. Parker and Alice Campbell to C. T. Bird *re* San Jose property	1.50
" 12.	1 acknowledgment. Power of Attorney Alice Campbell to C. T. Bird	1.00
Oct. 15.	3 Oaths and Court Clerk's Certificate *Re* Mrs. Parker and C. Brown *re* administration California property	1.25
Nov. 5.	Preparing affidavits, etc., *re* appointment of Guardian, San Jose contained in voucher # 71 of Cecil Brown for Legal Services	75.00
Dec. 1.	Paid 1 acknowledgment *re* San Jose Property	1.00
		$84.25

The Decision of this Court in the Matter of James Campbell, deceased, filed June 12th, 1903, bears upon these items in such manner, that the attention of the Court is respectfully directed to the question as to whether these items should not be surcharged.

The remaining items, except commissions of Executrix and Executors which will be considered later, are in order and correct.

Expenses account Principal $90,000.00

consists of

1903.		
July 18.	Purchase 25 Pioneer Mill Co. Bonds ($1000) Nos. 730 to 750 Inc. and 1059 to 1062 Inc.	25,000.00
Oct. 31.	Loan to Liliuokalani 2 years at 7%	35,000.00
Dec. 11.	Loan to L. B. Kerr & Co. on mortgage at 7%	30,000.00

The certificate of Executrix and Executors embodied in Schedule "C" sets forth these sums as having been paid out up to
165 December 31st, 1903.

Here again the question of commissions is involved. The Pioneer Mill Co. Bonds $25,000.00 were secured by an exchange with Hackfeld & Co., July 18th, 1903, for account of their note held by the Estate in the sum of $25,000.00 and cannot be construed as Principal actually paid out in view of its technical bearing upon the right of the Executrix and Executors to charge commissions on the transaction.

Loan to Lilinokalani $35,000.00 October 31st, 1902: $21,000.00 of this sum was practically an extension of an existing loan and is not therefor- Principal paid out.

As to balance of $14,000.00 on this loan and loan December 11, 1903, to L. B. Kerr & Co. of $30,000.00, in view of the large excess of Principal liabilities of the Estate paid, over and above cash principal received, as shown in preceding accounts, I submit that the Executrix and Executors had no principal to loan and that these items partake of the nature of Investment of Accumulated Income.

Allowance.

Paid Mrs. Parker, allowance for support and maintenance
6 mos. to Dec. 31st, 1903, at $1500 per month..... $9,000.00
Homestead Repairs..... 617.25
Vouchers for same being in order and correct.

This Court has held that these items should be charged to the corpus of the Estate and ought therefore to take precedence of loans to L. B. Kerr & Co. and Lilinokalani in being classified as principal paid out.

Miscellaneous expenses..... 157.00
166 Includes item of Dec. 17, 1904, Voucher 86, paid Holmes & Stanley in lieu of bond on appeal re Guardian..... 50.00

This payment was made on account of Mrs. Parker's appeal from Court's decision in appointing Guardian of the two Campbell minors. I am of the opinion that this does not constitute a proper charge against the Estate and recommend that this item be surcharged.

Expenses chargeable to interest..... $7,669.97
The items of this sum consist of July 16, 1903, accrued
Interest on $25,000.00 Pioneer Mill Co. Bonds..... 445.83
Commissions due Executrix and Executors..... 7,224.14

The item of Accrued interest is in order, while the commission charge I find to the contrary and will be analyzed under general head of commissions.

Executrix and Executors' Commissions.

Rents and Interest.

Upon the Income of Rents and Interest the following charges for commissions of Executrix and Executors appear, viz:

1st Expenses chargeable to Realty, Commissions Due:		
10% on First $1000.00	$100.00	
7% on next $4,000.00	280.00	
5% on Balance 42,445.98	2,122.34	
		$2,502.34
2nd Expenses chargeable to Interest, Commissions Due:		
10% on First $1000.00	100.00	
7% on next $4,000.00	280.00	
5% on Balance $27,723.48	1,386.17	
		$1,766.17
Total		$4,268.51

This being a repetition of higher percentages, it is apparent from the foregoing that commissions charged are clearly contrary to the statute which limits the commissions to 10% on First $1,-
167 000.00—7% on next $4,000.00 and 5% on Balance of Income. Further it appears that the previous accounts as of June 19th, 1903, were filed June 29th, 1903, and present account as of December 31st, 1903, were filed January 4th, 1904. In both accounts the higher rates of 10% and 7% commissions on Income are charged. The statute provides that a period of one year must elapse between accounts before repeating charge of the higher percentages. In this case not seven months has elapsed. The proper charge should be 5% on $80,170.46 total of Income from rents and interests or $1,008.51 showing an overcharge of the sum of $260.00 which amount it is recommended be surcharged.

Commissions on Principal Collected.

Referring to charge of 2½% commission on $149319.00 Principal collected, $3,732.97.

I find included therein Commission on payment September 15, 1903, of Mr. Robinson's promissory note for $96,100.00 dated January 8th, 1903, for 6 months at 6% per annum.

The details of this transaction are as follows: At the institution of the Trust, 500 shares of First American Bank stock and 250 shares of First American Savings and Trust Co. Stock were included in the assets of personal property of the Estate; $50,000.00 having been paid thereon, leaving balance of $25,000.00 unpaid, for which assessment was levied and paid by the Executrix and Executors August 13, 1900.

On January 8th, 1903, this stock was transferred to M. P. Robinson, the estate taking Mr. Robinson's promissory note for it in the sum of $96,100.00.

On September 15th, 1903, Mr. Robinson paid his note of $96,100.00 to the Estate.

The Executrix and Executors have charged three separate and distinct commissions of 2½% each upon the sum of
168 $96,100.00, 1st and 2nd when the stock was turned over to Mr. Robinson and his note taken therefor as principal collected and paid out; 3rd when Mr. Robinson paid his note, as principal collected, amounting to $7,207.50; $4,805.00 appearing in Second Account, filed June 29th, 1903, and $2,402.50 appearing in Third Account, filed January 4th, 1904.

The Executrix and Executors are not entitled to receive the two commissions charged on the transaction of January 8th, 1903, amounting to $4,805.00 on the ground that these transactions were but mere steps in the proceeding of reducing the Asset of Bank stock to cash; and this was not finally consummated until the payment by Mr. Robinson of his note on September 15, 1903.

The investment of $96,100.00 in the note of Mr. Robinson considered apart from its relation to reduction of the Bank Stock to cash principal, presents the following financial aspect in so far as the Estate itself is concerned.

The Estate assumes the risk of loaning its $96,100.00, received interest therefor in the sum of $3,956.11. Pays commissions $4,805.00 and $197.80. Total $5,002.80, showing that it is $1,046.69 poorer for the privilege of risking its $96,100.00. On the other hand considered as a step in facilitating the conversion of the Bank Stock to Cash, the transaction is one of favorable presentation.

Commission of 2½% on $25,000.00 of this sum of $96,100.00 had already been charged in the first account filed as cash principal received; it being a part of the cash principal of the Estate received prior to August 23rd, 1900, the date of payment of assessment on the bank stock.

Further, this $25,000.00 was not money received representing the Estate at the time of the institution of the Trust which would have to be the case in order to collect this com-
169 mission, as provided for in the statute governing commissions in the reduction of securities to cash.

It follows, therefore, that commission should be allowed on the sum of $71,100.00 only, amounting to $1,777.50, making overcharge on this item of $625.00.

I therefore recommend that the Executrix and Executors be surcharged with the sum of $5,430.00 to remedy the overcharges of commissions on the First American Bank Stock transactions.

On October 31st, 1903 Liliuokalani's promissory note was cancelled in the sum of $21,000.00 through the execution by her to the Estate of new note, on same date, in the sum of $35,000.00 for two years at 7%, thereby increasing the loan $14,000.00.

In this Transaction the Executrix and Executors have charged the Estate commissions of 2½% on the sum of $21,000.00 as cash principal collected $525.00.

They refrain from charging commission on this item under head

of principal paid out on the specifically stated ground that the transaction was an exchange.

I submit that the commission of 2½% on $21,000.00 charged as principal collected, in the sum of $525.00, is clearly in error, as the transaction was purely an exchange, and I therefore recommend that the Executrix and Executors be surcharged with the sum of $525.00 on this account.

July 18th 1903, Hackfeld & Co. note of $25,000.00 was cancelled by exchange for $25,000.00 Pioneer Mill Co. 6% Bonds. This $25,000.00 transaction is another case of exchange and technically not a conversion of principal to cash, such as would entitle the Executrix and Executors to receive commission of 2½% charged, viz: $625. I therefore recommend that this commission be surcharged:

170 The Executrix and Executors have failed to charge commission on principal collected in Second Account as of June 19th, 1903 as follows:

1902.	
Oct. 20. O. R. & L. Co. note due and paid.....	$5,000.00
1903.	
Jan'y 29. H. M. Von Holt Tr. paid account his note..	500.00
M'ch 31. O. R. & L. Co. note due 4/1/'03 and paid....	4,597.00
May 20. Sale of Grey Gelding.....	75.00
	$10,172.00

They were entitled to receive 2½% commission on same, amounting to $254.30 which I recommend be allowed.

April 1st, 1903. Lucy Peabody, her note and mortgage paid in full	$40,000.00

In Second Account, as of June 19th, 1903, commission of 2½% on this item as Principal collected, $1,000.00 is charged.

This transaction was an exchange of the note and mortgage for $40,000.00 Young Hotel Bonds, as evidenced in hearing before this Court July 20th, 1903, in the Matter of the Estate of James Campbell, deceased. (See transcript of evidence pages 23-24-25.)

A part of Mr. Cecil Brown's testimony on this matter is "We didn't pay money: it was an exchange; we assigned that mortgage over and we got the bonds: we assigned *to* mortgage to Mrs. Parker."

In view of these facts the Executrix and Executors are not entitled by Statute to receive commissions thereon and I recommend this item of $1,000.00 commission surcharged.

171 *Commissions on Principal Paid Out.*

2½ — on principal paid out, being as per these accounts	$90,000.00	
Less amount of Liliuokalani paid in, being an exchange	21,000.00	
	$69,000.00	$1,725.00
1903.		
Item July 18. Purchase Pioneer Mill Co. Bonds	$25,000.00	
Item Oct. 1st. Loan to Liliuokalani, net increase	14,000.00	
Item Dec. 11. Loan to L. B. Kerr & Co.	30,000.00	
		$69,000.00

The commission of $625.00 on Pioneer Mill Bonds transaction, I submit should be surcharged on the ground of its being an exchange, as stated with reference to H. Hackfeld & Co.'s note for $25,000.00. Beyond this, I am of the opinion that it is not a final payment in the sense intended by the statute. It is subject to redemption and is not a final disposition of the corpus of the Estate.

This latter contention also applies to loans to Liliuokalani $14,000.00 and L. B. Kerr & Co. $30,000.00 upon which commissions of $1,100.00 have been charged as final payment of the cash corpus of the Estate, with the additional feature, as already stated, that a large excess of principal liability of the Estate has been heretofore paid, over and above the amount of cash principal received, as shown in preceding accounts, and therefore there was no cash principal to loan, these items partaking of the nature of investment of accumulated income.

I therefore recommend that this commission of $1,100.00
172 be surcharged.

I recommend that the Executrix and Executors be allowed a commission of 2½% on $71,100.00 as final payment of cash principal amounting to $1,777.50.

This $71,100.00 was the part of Mr. Robinson's note paid that represented the Bank Stock which constituted corpus of the Estate at the institution of the Trust.

While this sum was not directly paid out upon its receipt, final payment of principal obligations had been made, out of income funds upon which commissions had not been charged and properly, but the commission should be forthcoming on these final payments whenever reimbursement of Income funds is made by receipt of cash principal.

In the Second Account June 19th, 1903, Commission $1,000.00 stated to be on Principal paid out April 1st, 1903 for Young Hotel Bonds $40,000.00.

The same proposition in the matter of exchange applies to this

item as it does to payment of Lucy Peabody mortgage, to which the attention of this Court has been directed.

I submit also that it is not a final payment such as entitles the Executrix and Executors to receive commissions, as set forth relative to Pioneer Mill Co. Bonds. It is recommended that this commission of $1,000.00 be surcharged.

The following is a statement of cash principal received and final payment of Principal Liabilities according to construction of will by this Honorable Court in its decision of June 12, 1903.

173 *Principal Received.*

First Statement, July 31, 1902		$346,481.99
Second do. July 19, 1903		19,024.79
Third do. December 31, 1903		78,319.00
		$443,825.78

Final Payments, Principal.

First Statement.

Mrs. Parker (devisee)	$357,711.01	
Family allowance	10,050.00	
Homestead repairs	18,891.88	
First National Bank Stock Assessment	25,000.00	
Hawaiian Hardware Stock Assessment	1,125.00	
		$412,777.89

Second Statement.

Family allowance	$10,300.00	
Homestead repairs	118.70	
Repairs to Fort and Queen Street Building, Expenses ins. paid	3,461.15	
Repairs Campbell Block Expenses ins. paid	8,852.79	
Administration Expense	1,867.00	
		$31,102.94

Third Statement.

Family allowance	9,000.00	
Homestead repairs	617.25	
		9,617.25
		$453,351.25

Excess of Principal payments over receipts of Principal $87,525.47

said sum having been paid from income and on which further commissions of 2½ should be allowed whenever corpus of the Estate is further reduced to cash.

There should be included in this balance, Final payments of

Principal, reported in the first account under head of "Expenses Proper," for debts, Expenses of Administration and Funeral
174 Expenses, etc., which this Court has held is a charge against the Principal of the Estate.

Further adjustment of the First Account will be necessary in order to determine exactly what these items are, as there has been no segregation.

Items on which I have differed with the Executrix and Executors as to what constitutes principal receipts and payments have been eliminated from this statement. This, however, does not effect the net result, as the exclusion in the one classification is counter balanced by exclusion in the other.

The Balance shown by Schedule "C" is	$245,816.94

This does not consist fully of cash as indicated by said Schedule. Its status is as follows:

Cash in First American Bank	$140,932.64
Cash in hand	3,612.40
Receipts representing advance to Princess Kawanana-akea and Alice Campbell	$15,366.10
Items surcharged as explained on page 2 of this report	100,104.97
	$260,016.11
Less Commissions not drawn by Executrix and Executors	14,199.17
	$245,816.94

All of which is respectfully submitted for the consideration of this Honorable Court.

WILLIAM R. SIMS, *Master.*

Dated, Honolulu, March 8th, 1904.

(Endorsed:) In the Circuit Court First Circuit Territory of Hawaii. In the Matter of the Estate of James Campbell, deceased. Master's Report on Supplemental Account of Executrix and Executors. Filed March 8th, 1904. Wm. R. Sims, Clerk.

175 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, *Deceased.*

Order.

The Master's Report upon the final accounts of the Executrix and Executors of the Last Will of James Campbell, deceased, having been submitted to the Executrix and Executors for about two months last past and no action having been taken thereon, and it appearing to the Court that the estate should be finally settled in the Probate

Court and a distribution had, and no good cause appearing why there should be further delay in the matter, It Is Hereby Ordered that the said report and the final accounts be set down for hearing on Thursday, May 5th, 1904 at 9:30 o'clock A. M. before the undersigned Judge of the above entitled Court, and that a copy of this order be personally served upon J. O. Carter, Esq., Mrs. Abigail, K. C. Parker, (Cecil Brown, Esq., being absent from the Territory), Princess Kawananakoa and Miss Alice Campbell parties interested in said matter.

GEO. D. GEAR,
2nd Judge First Circuit Court.

Hon., May 4th, 1904.

(Endorsed:) In the Circuit Court First Circuit Territory of Hawaii. In the Matter of the Estate of James Campbell, deceased. Hearing on Master's Report. Order Filed May 4th, 1904. Wm. R. Sims, Clerk.

176 SCHEDULE C.

Executor's, Administrator's, Guardian's or Trustee's Account.

Supplementary Account of A. K. Campbell Parker, J. O. Carter, Sr., and Cecil Brown, Trustees of the last Will and Testament of James Campbell, deceased.

The Trustees charge * * * with the following sum as per Schedule A, hereto annexed	$309,984.18
and ask to be allowed the following sum as per Schedule B, hereto annexed	23,494.22
Balance,	$286,489.96

I ( ) hereby certify that the foregoing account, and the Schedules marked A and B, hereto annexed and the vouchers herewith produced and filed, are full, true and correct statements of all sums received and paid out by us, or in our behalf, as said Trustees up to and including the 13th day of May, A. D. 1904.

J. O. CARTER.

Sworn to and Subscribed before me this 14th day of May, A. D 1904.

[SEAL.] P. H. BURNETTE.
Notary Public in and for the First Judicial Circuit, Territory of Hawaii.

(Endorsed:) Circuit Court First Circuit. In Probate. Estate of James Campbell, deceased. Supplementary Account of A. K. Campbell Parker, J. O. Carter, Sr., and Cecil Brown, Trustees. Filed the Fourteenth (14th) day of May, A. D. 1904. W. R. Sims, Clerk.

177 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

Before Gear, Judge. Third Supplementary Account Executrix and Executors.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Master's Report.

The following Report is respectfully submitted upon the Third Supplementary Account of A. K. Campbell Parker, J. O. Carter and Cecil Brown, Executrix and Executors of the Estate of James Campbell, deceased, filed May 14th, 1904 and covering period from and including January 1st, 1904 to and including May 13th, 1904.

The Executrix and Executors charge themselves with the sum of..... $309,984.18
as follows:

SCHEDULE "A."

Balance as per accounts of Dec. 31, 1903.....	245,816.94
Rents collected	39,799.22
Interest collected	10,294.52
Principal collected	14,000.00
Other collections	73.50

The balance of $245,816.04 as per accounts Dec. 31, 1903, as to its status, has been dealt with and explained by this Master in his Report upon previous accounts, dated March 8th, 1904, to which reference is respectfully made:

Rents collected $39,799.22

represents collection of Rentals during period of rents due as of previous current periods.

178 I find that no accounting has been made for Rental of office occupied by Mr. Cecil Brown, *et al.*, reference to which has been made in prior Master's report conformably to same. I recommend that the Executrix and Executors be charged with $450.00—5 months' rent at $90.00 per month from and including January 1904 and including May 1904.

Interest collected..... $10,294.52

correctly represents collections during period of interest on mortgages & bond and dividends on stocks held by the Estate.

Principal collected, viz.....		$14,000.00
1904.		
Febr'y 8.	C. W. Booth a/c $10,000.00 Mortgage.....	8,000.
May 2.	O. R. and L. Co. a/c 5,000. Note.....	5,000.
" 13.	H. M. Von Holt a/c Mortgage.....	1,000.

which items I find to be part of original corpus of the Estate and the receipt of which in effect reimburses the Executrix and Executors to the extent of $14,000.00 for Principal obligation heretofore paid from Income funds in their hands.

Miscellaneous Items 73.50

accounts for refund by tenants of water rates and taxes paid by the Estate.

The Executrix and Executors ask to be allowed the sum of $23,494.22

as follows:

SCHEDULE "B"

Expense chargeable to Realty 7,982.57

I have carefully checked and verified the vouchers corresponding to items under this head and find same in order and correct.

179 Expenses chargeable to Interest $1,385.22

consist of Commissions to Executrix and Executors.

5% on Interest and Dividends of $10,294.52		514.72
2½% on Principal collected $14,000.00		350.
2½% " following items, principal collected and now paid over to the Trustees:		
As per this account	$14,000	
" " previous account (no charge having been made) as follows:		
June 22, '03, Counter sold	35.	
July 1, '03, Sale of Land	264.	
" 23, '03, H. M. Von Holt Trustee	1500.	
Aug. 5, '03, Cottage sold	20.	
Sept. 15, '03, O. R. & L. Co. Note	5000.	
	$20819.	520.50

These items I find to be correct the latter charge of 2½% on $20,819.00 as final payment of Principal; same being conformable to previous report of this Master wherein it is stated that final payment of Principal obligations having been made out of Income funds, the commissions on such final payments should be forthcoming whenever reimbursement of Income funds is made by receipt of Cash Principal.

Allowance.

Paid Mrs. A. K. C. Parker % allowance 5 months at $1,500.00 ..... $7,500.00

is made conformably to Court's order and supported by vouchers accompanying account.

Homestead Repairs $6,624.43

This item is supported by vouchers which I have checked and verified and find to be in order. The whole sum practically having been expended in extensive repairs upon the Waikiki Homestead.

180	Other expenses	$2.00

are in order & correct.

The Balance shown by Schedule "C" is	286,489.96
Its Status is as follows:	
Cash in First National Bank of Hawaii	165,916.36
Cash in hand	1.407.10
Receipts representing payments to Mrs. Parker, Princess Kawanamakoa and Alice Campbell	36,635.70
Items surcharged as per previous report	100,104.97
	304,064.13
Less Commissions not drawn by Executrix and Executors	17,574.17
	$286,489.96

Respectfully submitted,

WM. R. SIMS, *Master.*

Honolulu, May 17th, 1904.

(Endorsed:) In the Circuit Court First Circuit, Territory of Hawaii. At Chambers. In Probate. In the Matter of the Estate of James Campbell, deceased. Master's Report on Third Supplementary Accts. of Executrix and Executors. Filed May 17th, 1904. Wm. R. Sims, Clerk.

181 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Exceptions of Executrix and Executors to Master's Report Filed March, 1904.

Now come A. K. Campbell-Parker, J. O. Carter and Cecil Brown, the Executrix and Executors of the Will of James Campbell, deceased, and except to the following findings, recommendations, charges and sur-charges of W. R. Sims, Master, in his report filed in the above entitled matter on the — day of March, 1904:

(1) "that no rental has been collected for the office *occupied for the transaction of business by Mr. Cecil Brown* and the Executrix and Executors of the Estate since the demise of Mr. Campbell April 21, 1900, a period of 44 months" and to the recommendation "that the Executrix and Executors be charged with the sum of $3990.00 — 44 months' rent at $90.00 per month

(2) "the Hackfeld note $25,000.00 and Liliuokalani note $21,000.00 are not sums actually received, but exchanges for other evidences of property as shown in Schedule "B."

Master's Report, page 3.

(3) "1903

182

Aug. 12.	N. Fernandez Notary fees San Jose property	4.50
" 12.	3 Certificates. Clerk of Court—*re* Notary to Power of Attorney Trustees. Mrs. A. K. C. Parker and Alice Campbell to C. T. Bird *re* San Jose property	1.50
" 12.	1 acknowledgment. Power of Attorney Alice Campbell to C. T. Bird	1.00
Oct. 15.	3 Oaths and Court Clerk's Certificate *re* Mrs. Parker and C. Brown *re* administration California property	1.25
Nov. 5.	Preparing affidavits, etc., *re* appointment of Guardian, San Jose contained in voucher # 71 of Cecil Brown for Legal services	75.00
Dec. 1.	Paid 1 acknowledgment *re* San Jose Property	1.00
		$84.25

The decision of this Court in the matter of James Campbell, deceased, filed June 12th, 1903, bears upon these items in such manner, that the attention of the Court is respectfully directed to the question as to whether these items should not be surcharged."

Master's Report, pages 4 & 5.

(4) "Expenses account Principal $90,000.00
consists of

1903.

July 16.	Purchase 25 Pioneer Mill Co. Bonds ($1000) Nos. 730 to 750 Inc. and 1059 to 1062 Inc.	25,000.00
Oct. 31.	Loan to Liliuokalani 2 years at 7%	35,000.00
Dec. 11.	Loan to L. B. Kerr & Co. on Mortgage at 7%	30,000.00"

"The certificate of Executrix and Executors embodied in Schedule "C" sets forth these sums as having been paid out up to December 31st, 1903."

Here again the question of commission is involved. The
183 Pioneer Mill Co. Bonds $25,000.00 were secured by an exchange with Hackfeld & Co. July 18th, 1903, for account of their note held by the Estate in the sum of $25,000.00 and cannot be construed as Principal actually paid out in view of its technical bearing upon the right of the Executrix and Executors to charge commissions on the transaction."

Master's Report, page 5.

(5) "Loan to Liliuokalani $35,000.00 October 31st, 1902; $21,000.00 of this sum was practically an extension of an existing loan and is not therefor- principal paid out."

"As to balance of $14,000.00 on this loan and loan December 11, 1903, to L. B. Kerr & Co. of $30,000.00, in view of the large excess of principal liabilities of the Estate paid, over and above cash principal received, as shown in preceding accounts, I submit that the Executrix and Executors had no principal to loan and that these items partake of the nature of Investment of Accumulated Income."

Master's Report, pages 5 & 6.

(6) "July 18th, 1903, Hackfeld & Co. note of $25,000.00 was cancelled by exchange for $25,000.00 Pioneer Mill Co. 6% Bonds. This $25,000.00 transaction is another case of exchange and technically not a conversion of principal to cash, such as would entitle the Executrix and Executors to receive commission of 2½% charged, viz: $625. I therefore recommend that this commission be surcharged."

Master's Report, page 10.

(7) "This transaction" (referring to the item in second account, "April 1, 1903, Lucy Peabody, her note and mortgage paid in full $40,000.") was an exchange of the note and mortgage for $40,000.00 Young Hotel Bonds, as evidenced in hearing before this Court July 20th, 1903, in the Matter of the Estate of James Campbell, deceased. (See transcript of evidence pages 23-24-25.)" 184

"A part of Mr. Cecil Brown's testimony on this matter is "We didn't pay money; it was an exchange; we assigned that mortgage over and we got the bonds; we assigned to mortgage to Mrs. Parker."

"In view of these facts the Executrix and Executors are not entitled by Statute to receive commissions thereon and I recommend this item of $1,000.00 commission surcharged."

Master's Report, page 11.

(8) "The commission of $625.00 on Pioneer Mill Bonds transaction, I submit should be surcharged on the ground of its being an exchange, as stated with reference to H. Hackfeld & Co.'s note for $25,000.00. Beyond this I am of the opinion that it is not a final payment in the sense intended by the Statute. It is subject to redemption and is not a final dispositon of the corpus of the Estate."

Master's Report, page 12.

(9) "I submit also that it" (*i. e.*, the investment of the $40,000.00 in Alexander Young Hotel Bonds) "is not a final payment such as entitled the Executrix and Executors to receive commissions, as set forth relative to Pioneer Mill Co. Bonds. It is recommended that this commission of $1,000.00 be surcharged."

Master's Report, page 13.

185 *"Final Payment - Principal."*

(10)

"First Sta-ment."

"Family allowance ..... $40,950.00"

Second Statement."

"Family allowance ..... 16,500.00"

"Homestead Repairs ..... 418.70"

"Third Statement."

"Family allowance ..... 9,000.00"

"Homestead Repairs ..... 617.25"

"Excess of Principal payments over receipts of Principal 62,526.20

said sum having been paid from income and on which further commissions of 2½% should be allowed whenever corpus of the Estate is further reduced to cash."

A. K. CAMPBELL PARKER,
J. O. CARTER,
CECIL BROWN,
Executrix and Executor.
By HOLMES & STANLEY,
Her Attorney- in Fact.

Honolulu, May 17th, 1904.

(Endorsed:) In the Circuit Court of the First Circuit Territory of Hawaii. At Chambers. In Probate. In the Matter of the Estate of James Campbell, deceased. Exceptions of Executrix & Executors to Master's Report Filed March 1904. Filed May 17th, 1904. Wm. R. Sims, Clerk. Holmes & Stanley Kaahumanu Street Honolulu Attorneys for Executrix & Executors.

186 Circuit Court First Circuit. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Now comes CECIL BROWN, one of the Executors under the last will and testament of the late James Campbell, deceased, and excepts to each and every one of the findings and conclusions of W. R. Simms, the master to whom were referred the accounts in the above entitled Estate, and ask to have such exceptions certified to the Supreme Court of the Territory of Hawaii.

Dated Honolulu, June 6th, 1904.

CECIL BROWN,
One of the Executors of the Will of James Campbell, Deceased.

(Endorsed:) Circuit Court First Circuit. In Probate. In the Matter of the James Campbell, deceased. Exceptions of Cecil Brown one of the Executors to findings of W. R. Simms on accounts P. 3404 21/18 Filed June 6th, 1904. Wm. R. Sims, Clerk.

187 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Decision on Final Accounts.

After a hearing of all the parties interested in the above matter and a careful consideration of the law and evidence I have arrived at the following conclusion on the accounts.

First as to the commission charged upon rents and interest. The executors and executrix have charged commissions of 10, 7 and 5% upon $47,146.98, the amount of rents and interest chargeable to realty, and 10, 7, and 5% upon $32,723.48, the amount of income and interest chargeable to interest or personal property. The whole amount of income was $80,170.46. If a charge of 10, 7 and 5% could be made it would only be proper to charge it once, and it was error to divide it into two parts and charge the 10% commission twice. But it seems clear to me that the 10 and 7% charges were not proper in any case for those rates were charged in the account filed in Jan. 1904, and could not be again charged until another year, whereas only a little over six months had elapsed before the supplemental account was filed. The Master's recommendation that the proper charge should be 5% on $80,170.46 I find to be correct, which would make the commissions due $4,008.51, instead of $4,268.51, making an overcharge of $260.00 which amount should be and is hereby surcharged.

188 Second. The next item to be considered is a charge of 2½% commission on $149,319.00 principal collected, amounting to $3,732.97. This includes commission on payment of the note of Mr. Mark Robinson for 96,100.00 dated Jan. 8th, 1903. This note was given by Mr. Robinson for the purchase price of 50 shares of the First American Bank and 25 shares of the First American Savings and Trust Co.

The note was paid by Mr. Robinson on September 15th, 1903. The accounts show that there have been three commissions of 2½% charged on this amount of $96,100.00, the charge of $2,402.50 being first made as the commission due when the stock was sold, as principal collected; the second charge of $2,402.50 being for commission when the note was taken as principal paid out; and the third charge of $2,402.50 being for the commission when the note was paid, as principal collected, making in all commissions of $7,207.50.

The Master says in his report: "The Executrix and Executors are not entitled to receive the two commissions charged in the transaction of Jan. 8th, 1903 amounting to $4,805.00 on the ground that these transactions were but mere steps in the proceeding of reducing the asset of bank stock to cash; and this was not finally consummated until the payment by Mr. Robinson of his note on September 15th, 1903.

"The investment of $96,100.00 in the note of Mr Robinson con-

D THRU

sidered apart from its relation of reduction of the bank stock to cash principal presents the following financial aspect in so far as the estate itself is concerned.

"The estate assumes the risk of loaning its $96,100.00 received interest therefor in the sum of $3,956.11. Pays commissions $4,805 and $197.50, total $5,002.80 showing that it is $1,046.69
189 poorer for the privilege of risking its $96,100.00. On the other hand considered as a step in facilitating the conversion of the bank stock to cash, the transaction is one of favorable presentation.

"Commission of 2½% on $25,000.00 of this sum of $96,100.00 had already been charged in the first account filed as cash principal received; it being a part of the cash principal of the estate received prior to August 23rd, 1900, the date of payment of assessment of the bank stock.

"Further this $25,000.00 was not money received representing the estate at the time of the institution of the trust which would have to be the case in order to collect this commission as provided for in the statute governing commissions in the reduction of securities to cash.

"It follows therefore, that commissions should be allowed on the sum of $71,100.00 only, amounting to $1,777.50 making overcharge on this item of $625.00.

"I therefore recommend that the Executrix and Executors be surcharged with the sum of $5,430.00 to remedy the overcharges of commissions on the First American Bank stock transactions."

Nothing need be added to the Master's lucid explanation of the overcharge of commissions. I approve the recommendation of the Master and order the Executrix and Executors to be surcharged on the item in question in the sum of $5,430.00.

Third. The next item is a charge of $525.00 as commission at 2½% on the sum of $21,000.00 loaned Lilinokalani by the testator, and which the Executors and Executrix have treated as principal collected, because of the execution of a new note by her for $35,000.00, upon increasing the loan by $14,000.00 additional.

The Master says as to this:

"In this transaction the Executrix and Executors have charged the estate commissions of 2½% of the sum of $21,000.00
190 as cash principal collected $525.00.

"They refrain from charging commissions on this item under the head of principal paid out on the specifically stated ground that the transaction was an exchange.

"I submit that the commission of 2½% on $21,000.00, charged as principal collected in the sum of $525.00 is clearly in error, as the transaction was purely an exchange, and I therefore recommend that the Executrix and Executors be surcharged with the sum of $525.00 on this account."

It seems to me that the Master is clearly right in this matter, as the transaction seems to me to be merely the making of an additional loan. If this is not so the executors might again increase the loan to $40,000.00 and charge commissions upon the $35,000.00, as money collected because the old note was cancelled. I therefore order

them surcharged with the sum of $525.00 charged by them as commissions on the transaction in question.

The next item is that of $25,000, collected on the note of Hackfeld & Co. The Master finds this was cancelled by an exchange for $25,000, worth of 6% Pioneer Mill Bonds. He says "This $25,000.00 transaction is another case of exchange and technically not a conversion of principal to cash, such as would entitle the Executrix and Executors to receive commission of 2½%, charged, viz: $625.00. I therefore recommend that this commission be surcharged."

Upon the hearing of the exceptions it was shown that this note was perfectly good and that the cash could have been obtained for it if the executors had so desired, but that as they did not want the money to remain uninvested they took the Pioneer Mill Bonds as payment.

191 It seems to me that this does not change the matter in any way, for the executors as a matter of fact took the Pioneer Bonds and not the cash and the transaction is exactly the same as it would have been if Hackfeld & Co. could not have paid the money and therefore paid this note by the transfer of Pioneer Mill Bonds. This Court cannot award commissions merely upon the ability of one to pay, but is governed by the transaction itself. I think the Master is right in his recommendation and therefore order the Executrix and Executors to be surcharged in the sum of $625.00 on account of this item.

The next item is a charge of $1,000.00 as commissions at 2½% upon the sum of $40,000.00 appearing in the second account as having been paid in full on April 1st by Lucy Peabody for her note and mortgage.

The Master finds that "this transaction was an exchange of the note and mortgage for $40,000.00 Young Hotel Bonds, as evidenced in hearing before this Court July 20, 1903, in the Matter of the Estate of James Campbell, deceased (See transcript of evidence, pages 23, 24, 25).

"A part of Mr. Cecil Brown's testimony on this matter is 'We didn't pay money; it was an exchange; we assigned that mortgage over and we got the bonds; we assigned the mortgage to Mrs. Parker.'

"In view of these facts the Executrix and Executors are not entitled by statute to receive commissions thereon and I recommend this item of $1,000.00 commission be surcharged."

The testimony on the hearing of the exceptions does not convince me that this commission should be allowed, as I am of the opinion that the finding of the Master is correct, and that the whole transaction was merely an exchange. The recommendation of the

192 Master will therefore be approved and the Executrix and Executors charged with the sum of ($1,000.00) one thousand dollars on this account.

On the items of commissions charged on principal paid out the Master objects to the charge of $525.00 as commissions on the item of July 18, 1903 on account of the payment of $25,000.00 for the purchase of Pioneer Mill Co. Bonds. The Master reports as follows:

"The commission of $625.00 on Pioneer Mill Bonds transaction I submit should be surcharged on the ground of its being an exchange, as stated with reference to H. Hackfeld & Co.'s note for $25,000.00. Beyond this I am of the opinion that it is not a final payment in the sense intended by the statute. It is subject to redemption and is not a final disposition of the corpus of the estate."

In this finding of the Master I concur on both the grounds stated. Upon all the evidence I am convinced that it was merely an exchange of securities, and I am also of the opinion that it can not in any view be considered as a final payment within the meaning of the statute. *This* is absolutely nothing to prevent the executors from selling these bonds and receiving the cash therefor, and in such a case how could it be considered as a final payment of the corpus of the estate. Even if considered as a payment of money for the bonds instead of an exchange it could not be considered as a final payment or disposition of a part of the estate, for it still remains as part of the estate in the hands of the Executrix and Executors. I will therefore order that the Master's report as to this item be approved, and surcharge the Executrix and Executors with the sum of $625.00 commissions charged on this item of $25,000.00.

The next item is of Oct. 1st, 1903, being the net increase on the loan to Liliuokalani of $14,000.00 upon which a commission of 2½% has been charged as part of the principal finally paid
193 out.

In the same category is an item of 2½% commissions charged on the sum of $30,000.00 loaned to L. B. Kerr December 11th, 1903, the commissions on both items being charged at 2½% or $1,100.00. The Master finds that these items are of the same character as the charge for the investment in Pioneer Mill Bonds and that they cannot be considered as part of the principal of the estate finally paid out within the meaning of the statute. He therefore recommends that the Executrix and Executors be surcharged with the sum of $1,100.00 which they have charged as commissions on these last two items and I think his recommendation should be approved and therefore order them surcharged in the sum of $1,100.00 on these two items.

The Master further recommends that the item of commission of $1,000.00 charged in the second account for principal paid out April 1st, 1903, for Young Hotel Bonds bought or taken in exchange for the $40,000 Lucy Peabody mortgage, should also be surcharged to the Executrix and Executors as it was neither a final payment, nor the payment of cash at all, but merely an exchange. The same observations the Court has just made upon the commissions charged on the Lucy Peabody mortgage apply equally as well to this item of charge for commissions for purchase of these bonds. As to whether the taking of these bonds was a proper investment the Court does not wish to express an opinion one way or the other, as the Court is of the opinion that under the rulings of the Supreme Court that is a matter in the discretion of the Executrix and Executors, and that they can not be controlled in their action until the investment is shown to be an improper one. But the Court is of

the opinion that they are not entitled to commissions on this transaction at is was merely an exchange and in no event can it be considered as principal of the estate finally
194 therefore approves the recommendation of the Master and orders them surcharged with $1,000.00 charged by them as commissions on the transaction in question.

The Master has also reported that the Executrix and Executors have failed to account for or collect rental for the office in the Campbell block occupied by them and Mr. Cecil Brown. The Master is of the opinion that the estate should receive revenue from this office and has recommended that the Executrix and Executors be charged with the reasonable rental value thereof, which he places at $90.00 being the rental of similar offices in the same location. The Master has recommended that they be surcharged for 14½ months' rent up to the time of his report, making $3,999.00 and now amounting to over $4,000. I am not prepared to say that this recommendation was not warranted by the Master under the facts upon which he based his report, but upon the hearing of the exceptions to the report the evidence has convinced me that this charge cannot be sustained. This office has been used as the office of the estate long prior to the death of the deceased, and while as used Mr. Brown did not pay rent therefor. It is true of course that this agreement with decedent ceased upon his, decedent's death, but the evidence shows to my satisfaction that it is absolutely necessary that the estate have just an office. The fact that — is occupied by others does not change my opinion as to right of the Executrix and Executors to occupy this office rent free, for it is shown that those occupying it are also engaged actively in matters pertaining to the estate. As no charge is made for the book-keeping and collecting of accounts, other than the commissions allowed by law it seems to me that the estate receives it *quid pro quo* for the occupancy of this office by Mr. Brown's employees. I am therefore of the opinion that the recommendation of the Master as to a surcharge for the rental
195 of this office in the sum of $1,000.00 or any other sum should not be approved, and I therefore disapprove of this recommendation and sustain the exception of the Executrix and Executors to this finding and recommendation.

The items of different sums amounting to $84.25 expenses incurred *in re* San Jose property should be discharged as the evidence shows that the property was turned over to the trustees and this item should not appear in the executors' account.

The item of $50.00 cash deposit in lieu of bond on appeal *in re* guardianship of the minor children clearly should not be charged to the estate and is therefore surcharged.

The Master has reported that the executrix have failed to charge commissions on $10,172.00 principal collected and has recommended that they be allowed 2½% on this account or $254.30. I approve this recommendation and allow this credit.

The Master has also reported that in his opinion the Executrix and Executors should be allowed a commission of 4½% on $71,100.00 as final payment of cash principal. He says: "While this

sum was not directly paid out upon its receipt final payment of principal obligations had been made out of income funds upon which commissions had not been charged and properly, but the commission should be forthcoming on these final payments whenever reimbursement of income funds is made by receipt of cash principal." He there recommends the allowance of $1,777.50. In the present state of the accounts this allowance cannot be properly made, but upon a re-adjustment of the accounts showing payment of the items properly chargeable to principal, out of the principal instead of the income in accordance with the former opinion in this matter, the allowance will be made.

196 I fully agree with the Master that further adjustment of the accounts is necessary in order to determine what items should be charged to principal in accordance with the former opinion.

As the Executrix and Executors have been surcharged with a total sum of $10,565.00 *over-charge on commissions* due it seems to me but proper to state here that according to the practice in this jurisdiction executors and administrators have been allowed to charge commissions only on all *moneys* actually received representing the estate at time of the institution of the trust, and for final payments of such *moneys* actually expended and paid out. They also are entitled to commissions on income, etc. If this were a new matter never before passed upon by the courts I should be constrained to hold in line with what I consider the authorities based on the better reasoning hold, to-wit:—that the word *moneys* would include stocks and bonds convertible into cash although no conversion had been made.

There is no more reason why an executor should receive his commission upon an estate consisting of $100,000.00 in cash, than there would be if the estate consisted of 100 $1,000 Pioneer Mill Bonds, yet under the prevailing practice he would receive nothing for his commissions in the latter case, unless he converted the bonds into cash. While it is not ordinarily the duty of an executor to invest the money of the estate pending ordinary administration proceedings, yet if he should convert good securities into cash merely for the sake of obtaining commissions, no doubt the courts would frown upon him. The responsibility of an executor holding a large quantity of negotiable bonds is as great as that of one holding their equivalent in cash. Why should one be entitled to commis-

197 sions and the other not? I can see no good reason for any distinction, and do not think the statute should be so construed. If it is the law then the temptation will always be before executors to turn their good securities into cash, in order to entitle them to commissions. Such a construction should not be given unless the statute imperatively requires it.

The Master's report will be approved as above set forth with the exceptions above noted, and upon the executors and executrix supporting the account in accordance with this opinion and prior opinions they will be discharged and their bonds cancelled upon filing receipts of the devisees under the Will, who are in fact the same

persons as the executrix and executors. The trustees will be required to give bonds in the sum of $12,000.00 each, that being the yearly income as shown by the evidence.

GEAR, J.

Messrs. HOLMES & STANLEY,
for Executrix and Executors.
J. J. DUNNE, Esq.,
for Princess Kawananakoa.

(Endorsed:) No. —. In the Circuit Court, First Circuit, Territory of Hawaii. At Probate. In Chambers. In the Matter of the Estate of James Campbell, deceased. Decision on Final Accounts. Filed July 25, 1904, 10:30 A. M. Wm. R. Sims, Clerk.

198 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Probate. At Chambers.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Order.

In accordance with the decision rendered herein on the 12th day of June, 1905, on the accounts filed by the Executrix and Executors of the Will of the deceased on August 25, 1902 and June 26, 1903, respectively; and the decision rendered herein on the 20th day of July, 1904, on the accounts filed by the Executrix and Executors aforesaid on January 4, 1904, and May 14, 1904, respectively,

It is hereby ordered:

(1) That the following payments by the Executrix and Executors to the persons mentioned be and the same are hereby disapproved and the Executrix and Executors be surcharged therewith:

Mrs. Parker	$53,274.65
Princess Kawananakoa	35,920.34
Alice Campbell	10,910.01

(2) That the commissions, amounting to $32,721.52 but charged in account of Executrix and Executors filed August 25, 1902 as $32,671.52 and as due them as Trustees, are allowed to the Executrix and Executors as Executrix and Executors but not to them as Trustees.

(3) That the following payments made by the Executrix
199 and Executors be charged to the principal of the personality of the Estate:

$357,741.91	Bequest of 1/3 of the personality to Mrs. Parker.
67,156.11	Expenses proper.
10,950	Family allowance.
38,821.88	Homestead repairs.
32,901.10	Investments—Assessments on shares in corporations.

(4) That the account of the Executrix and Executors be surcharged with the sum of $260.00, being the amount of the commissions charged by them on the sum of $80,170.10 in excess of the statutory commissions.

(5) That the account of the Executrix and Executors be surcharged with the sum of $5130.00, being the commissions charged by them on (a) the sum of $96,100.00 the proceeds of sale to M. P. Robinson of 500 shares of the capital stock of the First American Bank and 250 shares of the capital stock of the First American Saving and Trust Company; (b) the investment of $96,100.00 in the note of M. P. Robinson secured by said shares; and (c) the receipt of $96,100.00 being the proceeds on payment of said note; in excess of statutory commissions.

(6) That the account of the Executrix and Executors be surcharged with the sum of $525.00, being the commissions charged by them on the sum of $21,000.00 claimed by them to be principal collected from Lilinokalani.

(7) That the account of the Executrix and Executors be surcharged with the sum of $625.00, being the commissions charged by them on the sum of $25,000.00 claimed by them to have been principal of the Estate collected from H. Hackfeld & Company.

(8) That the account of the Executrix and Executors be
200 surcharged with the sum of $1000.00, being the commissions charged by them on the sum of $40,000.00 claimed by them to have been principal of the Estate collected from Lucy Peabody.

(9) That the account of the Executrix and Executors be surcharged with the sum of $625.00, being the commissions charged by them on the sum of $25,000.00 claimed by them to have been principal invested in Pioneer Mill Company bonds or paid to themselves on account of final payment.

(10) That the account of the Executrix and Executors be surcharged with the sum of $1100.00, being the commissions charged by them on the sum of $1,100.00 and $50000.00 claimed by them to have been principal invested on (a) $1100.00 on mortgage by Lilinokalani and (b) $50000.00 on mortgage by L. B. Kerr, or paid to themselves on account of final payment.

(11) That the account of the Executrix and Executors be surcharged with the sum of $1000.00, being the commissions charged by them on the sum of $40,000.00 claimed by them to have been principal invested in Young Hotel Bonds, or paid to themselves on account of final payment.

(12) That the account of the Executrix and Executors be surcharged with the sum of $84.25, being expenses incurred by them in connection with the San Jose property.

(13) That the account of the Executrix and Executors be surcharged with the sum of $50.00 cash deposited in lieu of bond *in re* guardianship of Campbell minors.

(14) That the Executrix and Executors be allowed the sum of $251.30, being commissions on the sum of $10,172.00 principal collected, omitted from their accounts.

(15) That upon a readjustment of the account showing payment of the items properly chargeable to principal out of the prin-
201 cipal instead of the income, in accordance with opinion filed June 12th, 1903, the Executrix and Executors will be allowed 2½% on $71,100.00 as final payment of cash principal.

(16) That upon the accounts of the Executrix and Executors being corrected in accordance with this order, they be discharged and their bonds cancelled upon filing the receipts of the devisees under the Will.

GEO. D. GEAR,
2nd Judge First Circuit Court.

(Endorsed:) In Circuit Court First Circuit. At Chambers. In Probate. In the Matter of the Estate of James Campbell, deceased. Order. Filed August 1st, 1904, 11:20 a. m. Wm. R. Sims, Clerk.

202 In the Circuit Court of the First Circuit, Territory of Hawaii.
In Probate. At Chambers.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Notice of Appeal and Appeal.

Now come Abigail K. Campbell Parker, J. O. Carter and Cecil Brown, the Executrix and Executors respectively of the Will of James Campbell, deceased, and give notice of their intention to appeal and hereby do appeal to the Supreme Court of the Territory of Hawaii from the order of the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, filed herein this first day of August, 1904, except as to those portions thereof wherein it is ordered as follows:

1. That the following payments by the Executrix and Executors to the persons mentioned be and the same are hereby disapproved and the Executrix and Executors be surcharged therewith:

Mrs. Parker	$53,274.65
Princess Kawanauakoa	35,920.31
Alice Campbell	10,910.01

(2) That the commissions, amounting to $32,721.52 but charged in account of Executrix and Executors filed August 25, 1902, as $32,671.52 and as due them as Trustees, are allowed to the Executrix and Executors as Executrix and Executors, but not to them as Trustees.

(3) That the account of the Executrix and Executors be
203 surcharged with the sum of $50.00 cash deposited in lieu of bond *in re* guardianship of Campbell minors.

(4) That the Executrix and Executors be allowed the sum of $254.30, being commissions on the sum of $10,172.00 principal collected, omitted from their accounts.

ABIGAIL K. CAMPBELL PARKER,
CECIL BROWN, AND
J. O. CARTER,
Executrix, Executors and Trustees under the Will of James Campbell, deceased.
By HOLMES & STANLEY,
Their Attorneys.

Dated at Honolulu, August 1, 1904.

Received a copy of the foregoing, this 1st August, 1904.

J. J. DUNNE,
Counsel for Princess Kawananakoa.

(Endorsed:) In the Circuit Court of the First Circuit, Territory of Hawaii. In Probate. At Chambers. In the Matter of the Estate of James Campbell, deceased. Notice of Appeal and Appeal. P. 3404 21/18. Filed Aug. 1st, 1904, at 3:57 P. M. George Lucas, Clerk. Holmes & Stanley, Kaahumanu St. Attorneys for Executrix and Executors.

204 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Appeal from Circuit Judge, First Circuit.

Submitted February 24, 1905. Decided March 8, 1905.

Frear, C. J., Hartwell and Wilder, JJ.

Circuit Judge:

Jurisdiction of circuit judge at chambers in probate to construe will not decided.

Executors—accounts—commissions:

Various matters of accounting and commissions of executors on certain transactions determined.

Opinion of the Court by Wilder, J.

James Campbell died in Honolulu on April 21, 1900, leaving a will which was admitted to probate before a circuit judge of the first circuit court sitting at chambers. Abigail K. Campbell, his widow, now Mrs. Samuel Parker, and J. O. Carter and Cecil Brown qualified as executrix and executors, respectively, under said will. On August 25, 1902, the executrix and executors filed their final accounts and petitioned for an order of distribution of the estate of the deceased to themselves as residuary devisees and legatees in trust. These accounts, after reference to a master, were passed upon by the second circuit judge sitting in probate on June 12, 1903.

On January 4, 1904, the executrix and executors filed a
205 further account, in which they conformed to this decision and showed certain additional payments. On May 14, 1904, the executrix and executors filed a supplemental account, which was referred to a master, who filed a report thereon. The executrix and executors excepted to certain findings of the master. After a hearing on these exceptions the second judge filed on July 25, 1904, a decision on final accounts and entered an order in conformity with

the various decisions. The executrix and executors duly appealed from that order, except as to items 1, 2, 13 and 14 thereof.

The appellants contend, in the first place, that item 3 of the order was outside the functions and beyond the power of the circuit judge, sitting in probate, to make, which item was as follows:

"That the following payments made by the executrix and executors be charged to the principal of the personalty of the estate:

$357,741.91	Bequest of one-third of the personalty to Mrs. Parker.
67,156.11	Expenses proper.
10,950.00	Family allowance.
38,824.88	Homestead repairs.
32,293.40	Investments—Assessments on shares in corporations."

The reasons that appellants give are that the order of distribution can be made without construing the will, and in order to pass on this item the will must be construed, which construction is a function of a court of equity and not of a court of probate; that the questions involved can only properly arise after the estate has been distributed, in this case the distributees being the executrix and executors to hold as trustees; and that the beneficiaries under the trusts created by the will would not be bound by such a construction in the present proceedings. To this, the contention, on
206 behalf of Princess Kawanauakoa, the appellee, is that the trial judge, sitting in probate, must necessarily have the power to construe the will wherever and to the extent necessary for the discharge of his duty in settling these accounts. Without deciding that this contention of the appellee is correct, still, so far as it appears from the record, the accounts can be settled, a decree of distribution entered, and the executrix and executors discharged, without the necessity of construing the will at this time. After the executrix and executors have accounted for all of the property of the decedent and have properly performed their duties, and consequently are entitled to be discharged, of what use is it to determine in advance questions that might or might not arise after the distributees, as trustees, have taken over the balance of the property? It is clear that the will need not be construed in order to determine to whom the executrix and executors should turn over the balance of the property remaining in their hands. It is also clear that the accounts can be passed on and settled without construing the will at this time.

The appeal as to item 3 of the order will be sustained, except in so far as it has been consented to by the appellants with reference to "investments" and "expenses proper".

Item 4 of the order is: "That the account of the executrix and executor be surcharged with the sum of $950, being the amount of the commissions charged by them on the sum of $80,170.16 in excess of the statutory commissions." This amount was surcharged because commissions at the rate of 10, 7 and 5 per cent. were charged in the accounts filed in January, 1904, and the trial judge held that commissions at those rates could not be again charged until the ex-

piration of another year from that time. Inasmuch as there
207 will have to be another account filed by the executrix and executors, when the question as to whether or not commissions at those rates may be charged will more properly arise, the appeal is sustained as to this item.

Item 5 of the order is: "That the account of the executrix and executors be surcharged with the sum of $5430, being the commissions charged by them on (*a*) the sum of $96,100 the proceeds of sale to M. P. Robinson of 500 shares of the capital stock of the First American Bank and 250 shares of the capital stock of the First American Savings and Trust Company; (*b*) the investment of $96,100 in the note of M. P. Robinson secured by said shares; and (*c*) the receipt of $96,100 being the proceeds on payment of said note; in excess of statutory commissions." The facts in connection with this transaction were as follows: When the testator died he owned 500 shares of the First American Bank Stock (afterwards the First National Bank of Hawaii) and 250 shares of the First American Savings and Trust Company upon which $50,000 had been paid. On August 13, 1900, the amount necessary to make the stock fully paid up, namely, $25,000, was paid. On January 5, 1903, the whole of this stock was sold to M. P. Robinson for $96,100 for which he gave his note, which was paid on September 15, 1903. Commissions amounting to $7,207.50 were charged in connection with this transaction.

Counsel for the appellants contend that they should only be surcharged with $1875, while Mr. Brown, one of the executors, contends that they should not be surcharged anything. The executrix and executors are entitled to charge on this transaction 2-1/2 per cent on $71,100 (being $96,100 less $25,000 paid to meet calls on the stock), which amounts to $1777.50. They were not entitled to again charge commissions of 2-1/2 per cent. on the same
208 amount. It is claimed that it was a final payment to themselves as distributees, but from the record we cannot so find. It was paid to them as executrix and executors and not as distributees. Consequently the appeal on this item is disallowed.

Item 6 of the order is: "That the account of the executrix and executors be surcharged with the sum of $525, being the commissions charged by them on the sum of $21,000 claimed by them to be principal collected from Liliuokalani." The facts of this transaction were substantially as follows: Testator in his life time had loaned to Liliuokalani various sums of money at different rates of interest on security of two mortgages on different pieces of real property, one of which mortages, by agreement between testator and Liliuokalani, was not recorded. She afterwards had an additional charge made to the mortgage that was not recorded. Certain sums were paid by Liliuokalani on account, both during Mr. Campbell's life time and after his death. When the existing indebtedness was reduced to $21,000, she made an application for a further loan of $14,000. The executrix and executors cancelled the two existing mortgages and loaned her $35,000 on the security of a new mortgage with interest at 7 per cent., the interest on one of the old mort-

gages being at 7 per cent. and on the other at 6 per cent. The executrix and executors charged a commission of 2½ per cent. on the $21,000 as principal money collected.

The trial judge held that the commissions charged were improper on the ground that the transaction was merely the making of an additional loan. With this view we cannot agree. The executrix and executors, so far as the record shows, used their best judgment in actually calling in the old Mortgages and making a new loan. We cannot say, in the absence of evidence, that they called in the
209 old mortgages and made a new loan simply in order to charge a larger commission. So far as the record appears, the executrix and executors used good judgment in handling this transaction. The appeal on this item is sustained.

Item 7 of the order is: "That the account of the executrix and executors be surcharged with the sum of $625, being the commissions charged by them on the sum of $25,000 claimed by them to have been principal of the estate collected from H. Hackfeld & Company." The facts of this transaction were substantially as follows: H. Hackfeld & Company were owing the testator in his life time about $300,000, evidenced by their promissory note, which was payable by installments of $25,000 per annum. The note was not secured other than by endorsements of members of the firm of H. Hackfeld & Company. An installment of $25,000 became due and was paid in June, 1903. Mr. Brown, on behalf of the executors, invested this $25,000 in Pioneer bonds, but instead of taking the cash from Hackfeld & Company and going to the Bank of Hawaii, where the bonds were deposited, and receiving the bonds in exchange for the cash, for the sake of convenience and saving interest he had Hackfeld & Company deliver the $25,000 worth of bonds to him direct, and he endorsed the payment of $25,000 on the note.

The trial judge held that this was an exchange of securities. We cannot agree with the trial judge in this matter. It seems to us that the transaction, so far as the statute on commissions is concerned, was the same as if Mr. Brown had received from Hackfeld & Company the $25,000 in cash and had then gone to the Bank of Hawaii and paid the $25,00 in cash for the twenty-five $1000 bonds of the Pioneer Mill Company. Merely because some one else did this for the executor does not change the real nature of the transaction.

The appeal on this item is sustained.

210 Item 8 of the order is, "That the account of the executrix and executors be surcharged with the sum of $1000, being the commissions charged by them on the sum of $40,000 claimed by them to have been principal of the estate collected from Lucy Peabody." The facts were as follows: Lucy Peabody was indebted to the testator in the sum of $40,000 secured by mortgage on real estate. She was over a year in arrears in interest, and it was decided by the executrix and executors that they should press for collection of the debt. Then Mrs. Parker said she would take it off the hands of the estate and wait for the interest. Mrs. Parker purchased the mortgage and took it over, paying for same by a check

on Claus Spreckels & Co., the proceeds from which check were invested by the executrix and executors in Young Hotel bonds.

The trial judge was of the opinion that the whole transaction was merely an exchange of securities and ordered the commission surcharged. It seems to us that counsel for the appellee fails to distinguish between what he terms the result of the transaction and the transaction itself. The result of the transaction certainly was that the estate got the Young Hotel bonds and Mrs. Parker got the Peabody mortgage, but that result could certainly have been reached by either a technical exchange of securities or by a sale of the Peabody mortgage and an investment of the proceeds therefrom. In our opinion this was practically the same as cash collected and reinvested. The appeal on this item is sustained.

Items, 9, 10 and 11 were as follows: "That the account of the executrix and executors be surcharged with the sum of $625, being the commissions charged by them on the sum of $25,000 claimed by them to have been principal invested in Pioneer Mill Com-
211 pany bonds or paid to themselves on account of final payment."

"That the account of the executrix and executors be surcharged with the sum of $1100, being the commissions charged by them on the sums of $14,000 and $30,000 claimed by them to have been principal invested on (*a*) $14,000 on mortgage by Lilinokalani and (*b*) $30,000 on mortgage by L. B. Kerr, or paid to themselves on account of final payment."

"That the account of the executrix and executors be surcharged with the sum of $1000, being the commissions charged by them on the sum of $40,000 claimed by them to have been principal invested in Young Hotel bonds, or paid to themselves on account of final payment."

Commissions were charged in each instance on the ground that these transactions constituted final payments by the executrix and executors to themselves as residuary distributees in trust. With this contention we cannot agree. The trustees have not even yet qualified. Executors cannot declare that to be a final payment, upon which commissions are charged, which is in fact not a final payment. One of the purposes of the present proceeding is to get an order of distribution and make a final payment. This is not a case where commissions are allowed to be charged on a simple paying out, but it must be a final payment. The appeals on these items are disallowed.

Item 12 of the order is as follows: "That the account of the executrix and executors be surcharged with the sum of $84.25, being expenses incurred by them in connection with the San Jose property." These charges appear to have been incurred in conection with property belonging to the estate and should be allowed. The appeal on this item is sustained.

Item 15 of the order is as follows: "That upon a readjustment of the account showing payment of the items properly
212 chargeable to principal out of the principal instead of the income, in accordance with opinion filed June 12, 1903, the

executrix and executors will be allowed 2½ per cent. on $71,100 as final payment of each principal." The appeal on this item is sustained for the reasons hereinbefore set forth and also because new accounts from the executrix and executors from the date of the last ones filed should be called for.

The order appealed from is set aside and the cause remanded to a judge of the first circuit court for such further proceedings as may be proper not inconsistent with this opinion.

W. F. FREAR.
ALFRED S. HARTWELL.
A. A. WILDER.

HOLMES & STANLEY,
For Executrix and Executors, Appellants.
CECIL BROWN,
In Person.
J. J. DUNNE,
For Princess Kawananakoa, Appellee.

(Endorsed:) Supreme Court Territory of Hawaii. *In Re* Estate of James Campbell. Decision. Filed March 8, 1905. George Lucas, Clerk.

213 In the Supreme Court, Territory of Hawaii, October Term, 1904.

In the *Estate* of the Estate of JAMES CAMPBELL, Deceased.

Remittitur.

The Supreme Court having on the 8th day of March 1905 filed its decision on the appeal of the Executors in the above entitled cause

It is therefore ordered and adjudged that the above entitled cause be and it hereby is remanded to the Second Judge of the First Circuit for such further proceedings as may be proper and not inconsistent with the said decision.

By the Court:

HENRY SMITH,
Clerk Judiciary Department.

Dated April 6, 1905.

(Endorsed:) In the Supreme Court Territory of Hawaii. P. 3401. October Term, 1905. *In Re* Estate of James Campbell, deceased. Remittitur. Filed April 6, 1905. Henry Smith, Clerk.

214 SCHEDULE C.

Executor's, Administrator's, Guardian's, or Trustee's Account.

Supplementary to final account of A. K. Campbell-Parker, J. O. Carter, Sr., and Cecil Brown, Executors of the Last Will and Testament of James Campbell, deceased.

The Executors charge themselves with the following sum as per Schedule A.....	$442,454.05
hereto annexed and asks to be allowed the following sum, as per Schedule B, hereto annexed.....	52,740.47
Balance	$389,713.58

We hereby certify that the foregoing account, and the Schedules marked A and B hereto annexed and the vouchers herewith produced and filed, are full, true and correct statements of all sums received and paid out by us, or in our behalf, as said Executors up to and including the 31st day of March, A. D. 1905.

CECIL BROWN,
ABIGAIL K. CAMPBELL PARKER,
J. O. CARTER,
Executors.

Sworn to and subscribed before me, this 14th day of April, A. D. 1905.

[SEAL.] F. F. FERNANDES,
Notary Public, 1st Judicial Circuit, T. H.

(Endorsed:) Circuit Court First Circuit. In Probate. Estate of James Campbell, deceased. Supplementary to Final Account of Abigail K. Campbell-Parker. J. O. Carter, Sr. and Cecil Brown, Executors. Filed the 17th day of April, A. D. 1905. Wm. R. Sims, Clerk.

215 In the Circuit Court of the First Circuit, Territory of Hawaii.
at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

J. J. Dunne, Esq., Attorney for Abigail K. Kawananakoa.

SIR: You are hereby notified that the Supplemental final accounts of the Executrix and Executors of the Will of the above named deceased, have been filed with the Honorable Alex. Lindsay, 2nd Judge of the Circuit Court of the First Circuit, and that the hearing thereon will be had on Friday, April 21st at 9:30 A. M. before said Judge.

Yours, etc.,
CECIL BROWN,
One of the Executors.

HOLMES & STANLEY,
Attorneys for Executors.

(Endorsed:) Circuit Court First Circuit, T. H. In Probate. In the Matter of the Estate of James Campbell, dec'd. Notice of hearing on Final Supplemental Accounts. Filed April 18, 1905. Geo. Lucas, Clerk.

216 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Probate.

Executrix and Executors' Fourth Supplementary Final Account Before Hon. A. Lindsay, Jr., 2nd Judge.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Master's Report.

The following Report is respectfully submitted to the Honorable Court upon the Fourth Supplementary Final Account of Ceeil Brown, J. O. Carter and Abigail K. Campbell Parker, Executors and Executrix of the Will of James Campbell, deceased, filed the 17th day of April, A. D. 1905, and covering period from and including May 14th 1904 to and including March 31st 1905.

The Executrix and Executors charge themselves with the sum of $1124154.05

Receipts as Per Schedule "A", viz:

1st.	Balance as per accounts filed May 14th 1904 ...	286489.96
2nd.	Rents collected	82394.51
3rd.	Interest collected	37173.48
4th.	Items surcharged per decision Supreme Court ...	8155.00
5th.	Principal collected	28191.10
6th.	Other items	50.00

Item 1st of $286489.96 correctly represents the cash balance in hands of Executrix and Executors as evidenced by previous accounts examined by this Master and filed as above stated.

Item 2nd of $82394.51 is the aggregate of Rentals collected and sundry water rates and taxes refunded by tenants, including the sum of $43200.00 from Oahu Railway and Land Co. Ltd. Lease, all of which I have with care examined and verified, and find to be in order.

217 Item 3rd of $37153.51 is the total sum of Interest collections upon Bond Investments, promissory Notes and Mortgages of the Estate which I find also to be correct upon verification.

Item 4th of $8155.00 is the sum of the several surcharges to the Executors and Executrix, made in accordance to Decision of the Supreme Court of the Territory, with reference to preceding accounts, which I find on comparison with said decision to be in proper form.

Item 5th of $28191.10 represents conversion to cash of corpus

of the estate in hand at the inception of the trust and which I find to be correct.

Item 6th — $50.00 covers reimbursement of court costs deposited in lieu of bond, and charged as a disbursement in prior account.

I therefore recommend that the sum total of receipts as rendered and charged to the Executrix and Executors, to wit: $142454.05, be approved.

The Executrix and Executors ask to be allowed the sum of $52740.47

Disbursements as Per Schedule "B", viz:

1st. Realty Expense	25694.74
2nd. Interest Expense	9457.48
3rd. Family Allowance	15000.00
4th. Homestead Repairs	446.20
5th. Other Expenses	2142.05

Item 1st $25694.74, consists of disbursements covering expense incident to the Real Property of the Estate, and is made of charges for repairs to buildings, water and sewer privileges, taxes, fire insurance premiums etc., together with commissions on income derived from realty in the sum of $4184.73 All of these disbursements are supported by vouchers, which I have checked, compared with schedule and find to be in order and correct.

218 Item 2nd $9457.48 is made up of the following:—

(*a*) Accrued interest on bonds purchased	250.00
(*b*) Income tax at interest	609.97
(*c*) Executors' commissions as to current account, and commissions on the items which are now adjusted to conform to recent decision of Supreme Court in this matter, with reference to preceding accounts	8602.51

Items of accrued interest and Income tax are supported by vouchers and in proper form. Commissions will be treated under separate head, treating of all commissions herein.

Item 3rd $15000 represents the total of Monthly family allowance paid to Mrs. Campbell-Parker in compliance with the order of Court, covering period from May 1904 to April 1905, vouchers being in order.

Item 4th $446.20, Homestead Repairs, is cost of installation of electric fixtures and lights at the Waikiki W. R. S. residence of the Estate. The vouchers for which I have examined and find to be correct.

Item 5th $2142.05, consists of miscellaneous expenses, administration expenses, educational bills of minors, etc., which I have verified by comparison with accompanying vouchers.

Commissions of Executrix and Executors.

Upon presentation to the Court of this 5th account on April 21st 1905, one of the Executors, Mr. Cecil Brown, in open Court, stated that the Executrix and Executors were entitled to charge a commission under the statute of 2½%, upon the whole balance of cash in hand, to wit $389,713.58, or $9742.84, when distributed to the Trustees of the Estate and requested the Court to pass upon same, which matter your Honor referred to the Master.

No claim based on this contention appears in the accounts, an analysis of which shows that the proposition requires a novel
219 construction of the statute providing for commissions of Exeutors etc. to sustain it.

As this matter stands, commissions on final payments of corpus of the estate were charged and paid in the several accounts from time to time, in anticipation of distribution, with a view of rendering complete and finished accounts; and now when distribution is in fact about to take place, it is proposed that an allowance be made of the same commissions again.

It is doubtful, in my opinion, if confusion in regard to this commission would have arisen, had the payment of it been deferred until actual distribution, instead of anticipating it as above stated.

The whole amount of principal which was corpus of the estate at the inception of the trust, collected up to March 31st 1905, was the sum of $572016.88
upon which the proper commission of 2½%, or 14300.42
has already been collected.

Commissions have also been paid on $605444.88
as final payments of principal of 2½% or $15136.13
The total revenue from Rents has been 451546.04
and from Interest 206617.26

and upon these revenue items the regular statutory commissions of 10-7.5%, have been charged and paid from time to time in the several accounts as rendered. And there can be no further allowance of commissions upon the final distribution for moneys constituting revenue collections.

Therefore it will be seen from the foregoing that the Executrix and Executors have already been paid all of the commissions to which they are legally entitled.

To this, however, there is a technical exception:—The above statement shows that commission on final payment of
220 cash principal has been charged and paid in the sum of 2½% on $605444.88
while it is also shown that the principal received was .. 572016.88
making what appears to be an overcharge of $835.70, or 2½% on 33438.00.

This discrepancy probably arises from transactions embodied — the First Account Filed, wherein the following was not classified as principal received.

Mendonca Note (collected)	$40000.00
Insurance (collection fire losses)	3480.46
	$43480.46

This Mendonca Note was part of the original corpus of the estate, and the Executrix and Executors, in the exercise of their judgment, called in this mortgage and made a new loan of like amount, securing new and additional collateral to that hypothecated for the protection of the first one. The decision of the Supreme Court in the matter of this E-state its ruling with reference to calling in the loan to Liliuokalani and making a new loan to her with additional security, warrants and justifies, in my opinion, the classification of this item as principal, with reference to figurings of commission on final payment.

The failure to classify the insurance item as principal was clearly an error of omission.

In recommending allowance of commission upon these items, it therefore appears that there has been an undercharge and not an overcharge of commissions for final payment of principal; adjustment being

2½% on final payment of $43480.46	$1087.01
Deduct 2½% on difference stated 33438.00	835.70
Leaving net allowance for commission on final payment of principal in addition to sum already charged of	251.31

221 *Commission on Revenue.*

The commission on revenue in the 3rd account was left by the Supreme Court in its decision to be adjusted in the account under consideration. I therefore recommend that a clerical error charging therein 10% on the first $2000, 7% on the next $8000, and 5% on the balance, be now corrected by a surcharge of $130.00

Which on the whole commission account would now entitle the Executrix and Executors to the sum of $121.31

over and above the amount that has been charged in the accounts.

Subject to the foregoing, I would respectfully recommend that the 4th Supplementary Account be passed and approved as rendered and filed.

WM. R. SIMS,
Master.

Honolulu, T. H. May 3rd, A. D. 1905.

(Endorsed:) Circuit Court First Circuit. Territory of Hawaii. At Chambers. In Probate. In the Matter of the E-state of James Campbell, deceased. 4th Supplementary Final Account of Executrix and Executors. Master's Report. Filed May 3rd, 1905. Wm. R. Sims, Clerk.

222 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Order Approving Accounts and Discharge.

Whereas Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, all of Honolulu, as Executrix and Executors respectively of the Will of James Campbell deceased did on the 25th day of August 1902 file in this Court their petition showing that on the 22nd day of June 1900 they were by this Court appointed Executrix and Executors respectively of the Will of said James Campbell, deceased; that they were duly qualified to act as such Executrix and Executors by filing an approved bond and taking out Letters Testamentary; that on the 19th day of July 1900 they filed in this Court their sworn inventory of all the assets of said Estate to them known; that they duly advertised notice to creditors in the English language in the Pacific Commercial Advertiser a newspaper printed and published in Honolulu for four successive weeks; that they have collected all sums by them known or believed to be due to said Estate which can be collected; that as such Executrix and Executors they have done all things required of them by the Statutes, or the Orders of this Court, or which prudent or faithful Executrix and Executors ought to do; that they present on Schedules A. B. and C annexed to said petition and made a part thereof, an account of all their receipts and expenditures up to and including the said 25th
223 day of August 1902, also of all the property remaining in their hands, belonging to the said Estate, and praying that said accounts may be examined and approved; that they and also their sureties, may be discharged from all further responsibilities concerning the said Estate, and that a final order of distribution may be made of the property remaining in their possession to the persons thereto entitled. Order to show cause was made returnable on Friday the 10th day of October 1902 at ten o'clock A. M. before the Hon. Geo. D. Gear, Second Judge of said Court at Chambers in the Court House at Honolulu; and it was further ordered that said order be published in the English language in the Daily Evening Bulletin, a newspaper printed and published in Honolulu for at least three successive weeks, the last publication to be not less than two weeks previous to the time therein appointed for said hearing; that they present on Schedules A. B. and C filed on the 29th day of June 1903, an additional account of all their receipts and expenditures to the said 25th day of August 1902; that they present on Schedule A. B. and C filed on the 4th day of January 1904 a second additional account of all their receipts and expenditures to the said 4th day of January 1904; that they present on Schedules A. B. and C filed on the 14th day of May 1904 a third additional account of all their receipts and expenditures to the said 14th day of May 1904 and that they present on Schedules A. B. and C filed on the 17th day of April 1905

a fourth additional account of all their receipts and expenditures to the 31st day of March 1905.

That at the time and place named in said order, on affidavit of its publication as prescribed in the terms thereof, the hearing of the said petition was regularly continued from time to time until the 20th day of June 1905 when due proof was made that said Executrix and Executors had done all the said things by them alleged to
224 have been done as required by the Statutes or by Orders of the Court, and that the said accounts and vouchers were coorect. And it further appeared upon examination that all the property of said Estate, appraised and inventoried, is duly accounted for by the said Executrix and Executors. It also further appeared, by proof then and there made that the persons hereinafter named are entitled to said Estate as hereinafter set forth.

Now therefore, it is ordered and adjudged by the Court here, that the said accounts of the said Executrix and Executors be allowed and that they are discharged from all further responsibility as such Executrix and Executors; that their bond be cancelled, and the sureties thereto released from further obligation. And that the said Executrix and Executors do deliver over the property remaining in their hands which is described in the Schedule hereto annexed to themselves as trustees under the Will of the said James Campbell, deceased, and do file with this Court, a proper receipt therefor, and that this Order be issued and take effect from the date of the filing of said receipt.

The persons entitled are as follows:
Abigail K. Campbell Parker.
Joseph O. Carter and
Cecil Brown.
Trustees under the Will of James Campbell, deceased.

ALEXANDER LINDSAY, JR.,
2nd Judge of the Circuit Court of the —— Circuit.

Dated this 3rd day of July, 1905.

Attest:
WM. R. SIMS,
Clerk of the Circuit Court of the —— Circuit.

225 *Inventory Estate of James Campbell.*

Real Property.

Fort and Hotel Streets, Honolulu	.....	$75,000
Emma Streets Residence,	"	20,000
Fort & Queen Streets,	"	70,000
Fort & Merchant Streets,	"	100,000.00
Fort Street, (Hackfeld),	"	40,000
Kapiolani Park Residence,	"	35,000
Nuuanu Street,	"	6,000
Beretania Street,	"	3,200
Beretania Street,	"	2,400

Punchbowl St. & Palace Walk, Honolulu	15,000
Masonic Hall, Cor. Queen & Fort Sts., Honolulu	28,000
Emma Street, (Bush premises) Honolulu	9,000
Kikihale, "	5,000
King Street, (Austin) "	6,500
Pasture land, Kapiolani Park "	10,000
Pohakuawaawaa, Kalihi, "	3,000
Ahupuaa of Honouliuli, Ewa, Oahu	256,000
Kahuku Ranch, Kahuku, "	64,000
Ahupuaa of Kahaualea, Puna, Hawaii	16,000
House & Lot, Lahaina, Maui	1,920
Cane land, " "	160
½ Ahupuaa of Nuu, Kaupo, Maui	4,000
St. James Hotel, San Jose, Cal	150,000
	$920,180

226 Personal Property.

Notes and Mortgages:

Angela C. Cunha,	Int. pd. to Oct. 25, '04	$1,500 at 6	%
H. M. Von Holt,	" Jan. 23, '05... *Bal.*	28,000 at 6	%
Liliuokalani,	" Oct. 30, '04	35,000 at 7	%
C. W. Booth,	" Aug. 2, '03	25,000 at 6	%
C. W. Booth,	" Feb. 27, '04... *Bal.*	2,000 at 6	%
Mrs. Nawahi,	" May 1, '04 and... $23.80 a/c int.	5,630 at 6	%
Godfrey Brown,	" Dec. 31, '04	35,000 at 6	%
R. P. Hose,	" Nov. 3, '04	700 at 8	%
Oahu R. & L. Co.,	" Jan. 1, '05	25,000 at 7	%
J. M. Ulunahele,	" Feb. 5, '05	1,100 at 9	%
Samuel Parker,	" Apr. 26, 04	20,000 at 6½	%
Samuel Parker,	" "	93,000 at 7	%
Hackfeld & Co.,	" Dec. 15, '04	50,000 at 6	%
L. B. Kerr & Co., Ltd.,	" Jan. 27, '05	30,000 at 7	%
		$351,930	

Bonds:

Kahuku Plantation Co.	27,000	
Alex. Young Bldg. Co. Ltd	40,000	
Pioneer Mill Co. Ltd	25,000	
J. P. Mendonca	40,000	
		132,000
125 shares Hawaiian Hardware Co. (in liquidation) 17% of which has been refunded. Value unknown.		
36 shares, American Sugar Refinery Co		3,600
8,524 shares Mutual Telephone Co., paid up		83,240
Furniture, household fixtures and utensils, carriages, etc., Emma St. Residence		10,562.05

Furniture, household fixtures and utensils, etc. Kapiolani Park Residence.....	10,277.65
	$591,609.70
Cash on hand.....	389,713.58
	$981,323.28

(Endorsed:) Cir. Ct. 1st Jud. Circuit. At Chambers. In Probate. *In re* Estate of Jas. Campbell, deceased. Order Approving Accounts and Discharge of Executors. P. 3404. Filed July 3rd, 1905. W. R. Sims, Clerk.

227 In the Circuit Court of the First Circuit. Territory of Hawaii. At Chambers. In Probate.

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

We, the undersigned duly appointed and confirmed as Trustees under and by virtue of the Last Will and Testament of James Campbell, deceased, do hereby acknowledge the delivery of possession to us of the following real property from Abigail K. Campbell Parker, Joseph O. Carter, Sr., and Cecil Brown, Executrix and Executors of the Will of said James Campbell:

Location.	Estimated value.
Fort & Hotel Streets, Honolulu.....	$75,000
Emma Street Residence, "	20,000
Fort & Queen Streets, "	70,000
Fort & Merchant Streets, "	100,000
Fort Street, (Hackfeld), "	40,000
Kapiolani Park Residence, "	35,000
Nuuanu Street, "	6,000
Beretania Street, "	3,200
Beretania Street, "	2,400
Punchbowl St. & Palace Walk, Honolulu.....	15,000
Masonic Hall, Cor. Fort & Queen Sts., Honolulu.....	28,000
Emma Street, (Bush premises) Honolulu.....	9,000
Kikihale, "	5,000
King Street, (Austin), "	6,500
Forward.....	$415,000

	Location.	Estimated value.
228	Br't forward	$415,100
	Pasture land, Kapiolani Park, Honolulu	10,000
Pohakuawaawaa, Kalihi	"	3,000
Ahupuaa of Honouliuli, Ewa, Oahu		256,000
Kahuku Ranch, Kahuku	"	64,000
Ahupuaa of Kahaualea, Puna, Hawaii		16,000
House & Lot, Lahaina, Maui		1,920
Cane land,	" "	160
½ Ahupuaa of Nuu, Kaupo, Maui		4,000
St. James Hotel, San Jose, Cal		150,000
		$920,180

And also the delivery and surrender to us of the following personal estate in their possession and control as such Executrix and Executors:

Notes and Mortgages:

Angela C. Cunha,	Int. pd. to Oct. 25, '04	1,500 at 6	%
H. M. Von Holt, Tr.	" Jan. 23, '05... *Bal.*	28,000 at 6	%
Liliuokalani,	" Oct. 30, '04	35,000 at 7	%
C. W. Booth,	" Aug. 2, '03	25,000 at 6	%
C. W. Booth,	" Feb. 27, '04... *Bal.*	2,000 at 6	%
Mrs. Nawahi,	" May 1, '04 and $23.80 a/c int..	5,630 at 6	%
Godfrey Brown,	" Dec. 31, '04	35,000 at 6	%
R. P. Hose,	" Nov. 3, '04	700 at 8	%
Oahu R. & L. Co.,	" Jan. 1, '05	25,000 at 7	%
J. M. Ulunahele,	" Feb. 5, '05	1,100 at 9	%
Samuel Parker,	" Apr. 26, '04	20,000 at 6½	%
Samuel Parker,	" "	93,000 at 7	%
Hackfeld & Co.,	" Dec. 15, '04	50,000 at 6	%
L. B. Kerr & Co., Ltd.,	" Jan. 27, '05	30,000 at 7	%
		$351,930	

229	Bonds:	
	Kahuku Plantation Co.	$27,000
Alex. Young Bldg. Co., Ltd.		40,000
Pioneer Mill Co., Ltd		25,000
J. P. Mendonca		40,000
		$132,000

Stocks:

125 Shares Hawaiian Hardware Co. (in liquidation) 17% of which has been refunded. Value unknown.	
36 shares American Sugar Refinery Co.	$3,600
8,324 shares Mutual Telephone Co., paid up.	83,240
	$86,840

Furniture, household fixtures and utensils, Carriages, etc., Emma St. Residence	10,562.05
Furniture, household fixtures and utensils, etc., Kapiolani Park Residence	10,277.65
	$21,839.70
Cash on hand	$389,713.58

Dated, Honolulu July 27th, 1905.

ABIGAIL K. CAMPBELL-PARKER.
J. O. CARTER, *Trustee.*
CECIL BROWN.

(Endorsed:) Circuit Court First Circuit. In Probate. Territory of Hawaii. In the Matter of the Estate of James Campbell, dec'd. Receipt of Trustees to Executrix and Executors. P. 3404. Filed July 28th, 1905, 11 A. M. W. R. Sims, Clerk.

230 In the Circuit Court of the First Circuit, Territory of Hawaii. at Chambers.

Charged in Cash Book Nov. 13/05. ($1 Stamp.)

In the Matter of the Estate of JAMES CAMPBELL, Deceased.

Know all men by these presents, that we Abigail K. Campbell Parker, J. O. Carter, Sr., and Cecil Brown, Principals and The United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, U. S. A. Sureties, are held and firmly bound unto the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, and his successors in office, in the penal sum of One Hundred and Twenty Five Thousand Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

The condition of the above obligation is such, that, whereas the above bounden Abigail K. Campbell Parker, Joseph O. Carter, Sr. and Cecil Brown have been duly appointed Trustees under the Will of the late James Campbell: Now if they shall faithfully perform the duties of said office, according to law, then this obligation shall be void, otherwise of full force.

Witness our hands and seals this 27 day of July, 1905.

ABIGAIL K. CAMPBELL-PARKER.
J. O. CARTER.
CECIL BROWN.

THE UNITED STATES FIDELITY AND GUARANTY CO.,
By R. W. SHINGLE,
A. LEWIS, JR.,
Its Attorneys in Fact.
[SEAL.]

230a The amount of the penalty, and the sufficiency of the sureties of the above Bond are hereby approved this 27th day of July, A. D. 1905.

ALEXANDER LINDSAY, JR.,
Second Judge of the Circuit Court of the First Circuit.

Attest:
W. R. SIMS,
Clerk Circuit Court of the First Circuit.

(Endorsed:) 1557. Circuit Court First Circuit. In Probate. In the Matter of the Estate of James Campbell, dec'd. Bond of Trustees. Filed July 27th, 1905, 4 P. M. W. R. Sims, Clerk.

231 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

Bill for Construction of Will.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Decree.

The above entitled cause duly came on for hearing before me on complainants' bill and on answers of several respondents on the — day of April, 1906, Messrs. Holmes & Stanley, appearing for complainants; A. G. M. Robertson, Esq. appearing for Abigail K. Campbell Parker; A. J. Dunne, Esq. appearing for Abigail W. Kawananakoa; Messrs. Thompson & Clemons, appearing for Alice K. Macfarlane; E. C. Peters, Esq. appearing for Muriel K. Campbell and Beatrice U. (Mary) Campbell, minors, and E. M. Watson, Esq. appearing for Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa and —— Kawananakoa, minors, and respondents herein.

The said cause being duly submitted on briefs filed by the respective parties and decision having been rendered by me on the questions submitted by the said bill and answers on the — day of May, 1906:

232 Now therefore it is hereby ordered adjudged and decreed (1) That the legacy and bequest to Abigail K. Campbell Parker contained in paragraph three of the Will of the late James Campbell is properly payable out of the cash on hand at the date of the Testator's death and the net income from the realty and personalty of the estate;

(2) That the sum of $46,000 expended by the Executrix and Executors in maintaining and repairing the residences of the Testator is payable out of the gross income of the realty of the estate;

(3) That the sum of $93,000 expended by the Executrix and Executors as Family Allowance up to the close of Administration proceedings is payable and should be charged to the income of the realty and personalty of the Estate and that Abigail K. Campbell Parker is not entitled to the payment of any sum by way of "Family Allowance" for the use of herself and children after the close of the administration of the estate;

(4) That the sum of $85,000 expended by the Executrix and Executors in connection with the realty of the estate, such as Executors' commissions on income, insurance, taxes and water rates, etc. should be charged against the income of the realty of the said estate;

(5) That the sum of $3745.95 expended by Abigail K. Campbell Parker for travelling expenses and maintenance of the children of Testator is a proper charge against the estate and should be paid out of the income of the realty and personalty, of the estate;

(6) That all sums to be expended by the Trustees by way of Family Allowance are payable out of the income of the estate before deducting the one-third part of the net income of the realty devised to said Abigail K. Campbell Parker in paragraph nine of the
233 said Will;

(7) That Abigail K. Campbell Parker is not entitled under the ninth clause of the said Will to any share of the income of the realty of the estate pending the closing of the administration of the Estate;

(8) That none of the children of the Testator are entitled to any share of the income of the estate pending the closing of the administration of the estate;

(9) That no share in the income of the estate vests in the children of the Testator during their minority or, being minors, before marriage; but that the right to share in such income is wholly contingent upon their reaching majority or marrying; and

(10) That the right to apply to this Court for further directions or relief is hereby reserved to the parties hereto.

Dated, Honolulu, June 25th, 1906.

(Signed) ALEXANDER LINDSAY, Jr.,
Second Judge of the Circuit Court of the First Judicial Circuit.

(Endorsed:) In the Circuit Court of the First Judicial Circuit Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown Trustees under the Will and of the Estate of James Campbell, deceased Complainants, *vs.* Abigail K. Campbell Parker, Abigail W. Kawananakoa, Alice K. Macfarlane, Muriel K. Campbell, a minor, Beatrice U (Mary) Campbell, a minor, Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor and —— Kawananakoa, a minor, Respondents. Decree. Bill for Construction of Will. Filed June 25, 1906, 10 A. M. Sims, Clerk.

234 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Bill for Construction of Will.

Notice of Intention to Appeal and Appeal.

Now comes Abigail K. Campbell Parker, one of the respondents herein, and gives notice of her intention to appeal and does hereby appeal from the decree made and entered in the above entitled cause by the Honorable Alexander Lindsay, Jr., Second Judge of said Court, on the 25th day of June, 1906, to the Supreme Court of the Territory of Hawaii.

(Signed) ABIGAIL K. CAMPBELL PARKER.
By Her Attorney, A. G. M. ROBERTSON.

Dated, Honolulu, June 28, 1906.

(Endorsed:) E. 1488. Reg. 1/260. Circuit Court First Circuit. In Equity. Abigail K. Campbell Parker, *et al;* Trustees, *v.* Abigail K. Campbell Parker, *et als.* Notice of Intention to Appeal and Appeal. Filed June 28, 1906 at 3:5 P. M. J. A. Thompson, Clerk. A. G. M. Robertson Att'y for A. K. Campbell-Parker, one of Respondents.

235 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Bill for Construction of Will.

Notice of Appeal and Appeal.

Now come Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa, and —— Kawananakoa, minors, three of the

respondents above named, by E. M. Watson, their guardian *ad litem*, and hereby give notice of appeal, and do hereby appeal, to the Supreme Court of the Territory of Hawaii, from that certain Decree of the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court of the First Judicial Circuit, heretofore, to wit, on the 25th day of June, A. D. 1906, given, made, rendered entered and filed in the above entitled cause, and from the whole thereof.

ABIGAIL HELEN KAPIOLANI KAWANANAKOA,
DAVID KALAKAUA KAWANANAKOA,
—— KAWANANAKOA,

(Signed) By E. M. WATSON, *Their Guardian ad Litem.*

Dated: Honolulu June 30th, 1906.

(Endorsed:) E. 1488. Reg. 1/260. Circuit Court First Circuit. Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell Parker *et al.* Trustees *vs.* Abigail K. Campbell Parker *et al.* Notice of Appeal of Kawananakoa minors. Filed June 30, 1906 at 10:55 A. M. Thompson, Clerk. E. M. Watson Guardian *ad litem* and attorney for said minors.

236 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Bill for Construction of Will.

Notice of Appeal and Appeal.

Now comes Abigail W. Kawananakoa, one of the respondents in the above entitled cause, by J. J. Dunne, Esq., her attorney, and hereby gives notice of appeal and does hereby appeal to the Supreme Court of the Territory of Hawaii from that certain decree of the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court of the First Judicial Circuit, heretofore to-wit, on the 25th day of June, A. D. 1906, given, made, rendered, entered and filed in the above entitled cause, and from the whole thereof.

Dated, Honolulu, this 27th day of June, A. D. 1906.

ABIGAIL W. KAWANANAKOA,

(Signed) By J. J. DUNNE, *Her Attorney.*

237 To the above named Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, and Messrs. Holmes & Stanley, their attorneys; Abigail K. Campbell Parker, and A. G. M. Robertson, Esq., her attorney; Alice K. Macfarlane and Robert W. Breckons, Esq., her attorney; Muriel K. Campbell, a minor, and Beatrice U. (Mary) Campbell, a minor and E. C. Peters, Esq., their attorney and Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa and —— Kawananakoa, minors, and E. M. Watson Esq., Guardian *ad litem* and attorney for said minors:

Of the foregoing notice of appeal and appeal please take notice and govern yourselves accordingly.

ABIGAIL W. KAWANANAKOA,
(Signed) By J. J. DUNNE, *Her Attorney.*

Service of the foregoing notice of appeal and appeal is hereby admitted this 28th day of June, A. D. 1906.

(Signed) HOLMES & STANLEY,
Attorneys for Trustees under the Will and of the Estate of James Campbell, Deceased.

(Signed) A. G. M. ROBERTSON,
Attorney for Abigail Campbell Parker.

(Signed) R. W. BRECKONS,
Attorney for Alice K. Macfarlane.

——,
Guardian ad Litem of Muriel K. Campbell and Beatrice U. (Mary) Campbell, Minors.

(Signed) E. M. WATSON,
Guardian ad Litem of Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa, and —— Kawananakoa, Minors.

(Endorsed:) E. 1499. Reg. 1 250. Circuit Court First Judicial Circuit Territory of Hawaii. At Chambers In Equity Abigail K. Campbell Parker *et al.*, Trustees, etc. *vs.* Abigail K. Campbell Parker *et al.* Notice of Appeal and Appeal of Abigail W. Kawananakoa. Filed June 28 1906 at 3:30 P. M. J. A. Thompson, Clerk. J. J. Dunne Solicitor for Abigail W. Kawananakoa.

238 In the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Bill for Construction of Will.

Notice of Appeal and Appeal.

Now come Muriel K. Campbell, a minor, and Beatrice U. (Mary) Campbell, a minor, two of the respondents in the above entitled cause, by E. C. Peters, Guardian *ad litem* of said minors, and hereby give notice of appeal and do hereby appeal to the Supreme Court of the Territory of Hawaii from that certain decree of the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court of the First Judicial Circuit, heretofore to-wit on the 25th day of June, A. D. 1906, given, made, rendered, entered and filed in the above entitled cause.

Dated Honolulu, this 30th day of June, A. D. 1906.

MURIEL K. CAMPBELL, *A Minor, and*
BEATRICE U. (MARY) CAMPBELL,
A Minor.

(Signed) By E. C. PETERS,
Guardian ad Litem for said Minors.

239 To the above named Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, and Messrs. Holmes & Stanley their attorneys; Abigail K. Campbell Parker, and A. G. M. Robertson Esq., her attorney; Abigail K. Kawananakoa and J. J. Dunne, her attorney; Alice K. Macfarlane and Messrs. Thompson & Clemons, and Robert W. Breckons, Esq., her attorneys; and Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa and — Kawananakoa, minors, by E. M. Watson, Esq., Guardian *ad litem* and attorney for said minors:

Of the foregoing notice of Appeal and Appeal please take notice and govern yourselves accordingly.

MURIEL K. CAMPBELL, *A Minor, and*
BEATRICE U. (MARY) CAMPBELL,
A Minor.

(Signed) By E. C. PETERS,
Guardian ad Litem for said Minors.

(Endorsed:) E. 1488. Reg. 1 260. Circuit Court First Circuit. Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell Parker *et al.* Trustees *vs.* Abigail K. Campbell Parker *et al.* Notice of Appeal and Appeal of Muriel and Beatrice U. Campbell, minors. Filed June 30, 1906, at 10:50 A. M. J. A. Thompson, Clerk.

240 To the Clerk of the Supreme Court of the Territory of Hawaii, and to the Clerk of the Honorable Alex. Lindsay, Jr., Second Judge of the First Judicial Circuit, Honolulu, Hawaii:

I, Alice K. Macfarlane, through and by my Attorney, R. W. Breckons, do hereby, in accordance with the provisions of Section 1859, Revised Laws of Hawaii, and other provisions of law relative thereto, deposit with you the sum of Fifty dollars ($50.00) in lieu of bond on appeal provided for by said Section 1859 and said provisions of law, said deposit being made by me by reason of my appeal from a decree duly and regularly entered on the 25th day of June, A. D. 1906, in the following entitled cause:

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ALICE HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Bill for Construction of Will.

241 And in accordance with said Section 1859, and other provisions of law relative thereto, I do now pay all costs accrued in said cause, to-wit, the sum of Thirty-Seven Dollars. ($37.00.)

ALICE K. McFARLANE.

(Signed) By Her Attorney, R. W. BRECKONS.

242 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Bill for Construction of Will.

Notice of Appeal and Appeal.

Now comes Alice K. Macfarlane, one of the respondents in the above entitled cause, by R. W. Breckons, Esq., her Attorney and hereby gives notice of appeal, and does hereby appeal, to the Supreme Court of the Territory of Hawaii, from that certain Decree of the Honorable Alexander Lindsay, Jr., Second Judge of the Circuit Court of the First Judicial Circuit, heretofore, to-wit, on the 25th day of June, A. D. 1906, given, made, rendered entered and filed in the above entitled cause, and from the whole thereof.

Dated Honolulu, this 29th day of June, A. D. 1906.

ALICE K. McFARLANE,

(Signed) By Her Attorney, R. W. BRECKONS.

243 To the above named Abigail K. Campbell Parker, Joseph O. Carter, and Cecil Brown, trustees under the will and of the estate of James Campbell, deceased, and Messrs. Holmes & Stanley, their attorneys; Abigail K. Campbell Parker and A. G. M. Robertson, Esq., her attorney; Abigail W. Kawananakoa and J. J. Dunne, Esq., her attorney; Muriel K. Campbell, a minor, and Beatrice U. (Mary) Campbell, a minor, and E. C. Peters, Esq., their attorney; Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa, and —— Kawananakoa, minors, and E. M. Watson, Esq., guardian *ad litem* and attorney for said minors:

Of the foregoing Notice of Appeal and Appeal, please take notice, and govern yourselves accordingly.

ALICE K. MACFARLANE,

(Signed) By R. W. BRECKONS,

Her Attorney.

Service of the foregoing Notice of Appeal and Appeal is hereby admitted this 29th day of June, A. D. 1906.

(Signed) HOLMES & STANLEY,
Attorneys for Trustees under the Will and of the Estate of James Campbell, Deceased.

(Signed) A. G. M. ROBERTSON,
Attorney for Abigail Campbell Parker.

(Signed) J. J. DUNNE,
Attorney for Abigail W. Kawananakoa.

(Signed) E. C. PETERS,
Guardian ad Litem of Muriel K. Campbell and Beatrice U. (Mary) Campbell, Minors.

(Signed) E. M. WATSON,
Guardian ad Litem of Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa, and —— Kawananakoa, Minors.

(Endorsed:) E. 1488. Reg. 1 260. Circuit Court, First Circuit. Territory of Hawaii. Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees *vs.* Abigail K. Campbell Parker, *et al.* Notice of Appeal and Appeal — Alice K. Macfarlane. Filed June 30, 1906, at 10 A. M. J. A. Thompson, Clerk. Attorney for Alice K. Macfarlane.

241 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased,

v.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor.

Appeal from Circuit Judge, First Circuit.

Submitted October 4, 1906; Decided October 29, 1906.

Frear, C. J., Hartwell and Wilder, JJ.

Wills—construction.

A legacy to a widow of one-third of the personalty to be "paid in cash, and if the condition and interests of my estate shall not warrant the payment of the entire sum hereby contemplated at one time, then my executrix and executors shall pay the same as rapidly as the income and interests of my estate shall permit, without the sale of any real estate or the sacrifice of any personal property, as a means of raising such sum, but provided that the entire sum shall

be paid within two years," was properly paid from cash on hand and income from all sources.

Expenses for maintaining and repairing residences under a direction in the will to "maintain said residences, buildings and grounds in suitable condition and repair at the charge of my estate," were properly paid out of the general income of the estate.

245 Under a direction in the will to "pay to my said wife for the use of herself and our children as a family allowance such sum monthly as may from time to time be approved and decreed by the court having jurisdiction of the probate of this will," it was proper to charge such family allowance against the gross income of the estate. Under the will such allowance ceased upon the discharge of the executors. An extra sum expended by the widow for traveling expenses of two of her children, which was approved by the circuit judge sitting in probate, is held in this case to constitute a proper charge against the estate.

Sums expended by the executors in connection with the realty, such as commissions on income from realty, insurance, taxes, water rates, alterations to buildings other than homesteads, etc., were properly paid out of the gross income of the estate where the only direction in the will is that the executrix and executors are to take possession of and manage the estate and collect the income therefrom pending distribution.

Under the provisions of the will the widow's one-third of the net income from realty should be paid before family maintenance for minor unmarried children is deducted.

A provision in the will that income be paid by the trustees to the widow and children does not entitle the widow and children to income beginning with the death of the testator but only from and after the discharge of the executors.

Under a provision that net income be 'divided into as many equal parts as there shall be then *in esse* any of my said children by my said wife shall be by said trustees paid to my said children

246 from and after their respective majority or marriage share and share alike," a minor unmarried child takes a contingent interest.

Opinion of the Court by Wilder, J.

This is a bill in equity brought by the trustees under the will of James Campbell to construe certain portions of said will. From the decree of the circuit judge all of the defendants appealed. The will was admitted to probate on June 26, 1900, and on July 3, 1905, the plaintiffs, as executrix and executors, were discharged and ordered to distribute to themselves as trustees the balance of the property. Testator left a widow and four daughters surviving. At the time this suit was brought two of the daughters were of age and had married, one of them having three children. At the testator's death there was over $200,000 cash on hand and an annual income from all sources of over $100,000.

The portions of the will material to be considered are as follows:

"First. My executrix and executors, hereinafter named, are directed to reduce to possession all and singular my estate, real, personal, and mixed, wheresoever situated; and to manage, control, care for and collect the income and revenue thereof, pending the distribution thereof as hereinafter provided; to catalogue, inventory and appraise the same, and to secure an adjudication, by the court of the Hawaiian Islands having jurisdiction of such matters, of the value thereof. As the interests of my wife, and of my children, concerning such valuation, may conflict, it is my will that each of said interests be fully represented in the proceedings for the determination of the value of my estate.

"Second. I direct my said executrix and executors to pay and discharge all debts which shall be outstanding against me or my estate, including all expenses of my last illness and funeral.

"Third. To my wife, Abbie Campbell, I give, devise and bequeath a sum of money equal and equivalent to a one-third (⅓) proportion of the sum which, in accordance with paragraph numbered first hereof, shall be finally decreed and determined to be the value of the personal property only, belonging and pertaining to my estate, at the date of such decree and determination, and after the payment and discharge, or provision for the payment and discharge of all obligations contemplated by paragraph numbered second hereof. Such sum shall be paid in cash, and if the condition and interests of my estate shall not warrant the payment of the entire sum hereby contemplated, at one time, then my executrix
247 and executors shall pay the same as rapidly as the income and interests of my estate shall permit, without the sale of any real estate, or the sacrifice of any personal property, as a means of raising such sum, put provided that the entire sum shall be paid within two years from the date of my decease, and no deferred payments shall, within said period of two years, draw any interest. The said sum to be and become the absolute separate property of my said wife. To have and to hold unto her, her executors, administrators and assigns forever.

"Fourth. It is my will that my said wife, and our children, namely, Abbie, Alice, Muriel and Mary, together with any other child or children that shall be born to us, shall, during the life of my said wife, have and enjoy the free use and occupation of my residence-houses and grounds at Emma Street, and at Leahi, in said Honolulu; together with all and singular the furniture and fittings therein; the outhouses thereon; and the horses, carriages, harness, stock and utensils therewith used or thereto in any wise appertaining,—as and for a place and places of family residence. Each of my children shall continue to enjoy such right of residence, with the incidental rights above described, while he or she shall remain sole and unmarried, and no longer; and this irrespective of whether my said wife be then living or not. And my executrix and executors, or the trustees appointed hereunder, as the case may be, shall maintain said residences, buildings and grounds in suitable condition and repair, at the charge of my estate, during the life of my said wife, and thereafter while all of my then living children shall be entitled

to reside therein. But when any child, by contracting marriage, shall lose such right of residence, then and thereafter (my wife being dead,) the expense of such maintenance and repairs shall be borne by those of my said children who shall be entitled to occupy said premises hereunder.

"Fifth. I direct that my executrix and executors do pay to my said wife, for the use of herself and our children, as a family allowance, such sum, monthly, as may from time to time be approved and decreed by the court having jurisdiction of the probate of this will. And the trustees herein provided for, from and after their entry upon their functions of trust hereunder, shall make such further provision for the maintenance of said children as is hereinafter directed.

"Sixth. At and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered respectively second and third hereof, I will and direct that my executrix and executors shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate. And I do give, devise and bequeath unto the trustees hereinafter named, and to those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest, residue and remainder of my estate, not hereinbefore otherwise given, devised or bequeathed. To have and to hold unto said trustees, their respective heirs, executors, administrators, assigns and successors in trust hereunder, forever. But in trust nevertheless, for the uses and purposes hereinafter expressed and set forth, that is to say:—

"Seventh. With respect to my said residence-houses, and premises, and the personalty therein and thereon, as mentioned in paragraph numbered fourth, hereof, to permit and suffer the same to be used and occupied, and to maintain and keep the same in repair, as provided in said paragraph fourth, and, at the termination of the free use and occupancy thereof, as therein provided and limited, said property, both real and personal, shall be by my said trustees, (for the time being) partitioned among my then surviving children and the lawful issue of any deceased child (taking by representation) in such manner, and upon such terms and conditions as to payment of owelty and otherwise, as the parties entitled hereunder shall agree. And in case of their failure to agree, within a
248 reasonable time, it shall be the duty of such trustees to procure a judicial decree to make such partition; and to carry into effect any partition which shall be agreed upon or decreed hereunder, by suitable deed or deeds of conveyance.

"Eighth: With respect to all property which shall be so distributed to them, other than that mentioned in the last preceding paragraph, I direct my trustees aforesaid, to reduce it to possession, and to hold, manage, control, preserve and direct it; and to pay all costs and charges thereof, including their own commissions for such administration. And to collect all the rents, issues, profits, income and revenue thereof, and collect and realize upon all credits and securities, at such times, and in such manner, and upon such terms as to them shall seem best,—and to invest and reinvest, and keep

nvested,—and at will to change the investments of any and all moneys that shall come to their hands by virtue hereof, and which are not otherwise herein specifically bequeathed, assigned or appropriated; and to segregate, and keep separate and apart (during the life of my wife,) the accounts of and pertaining to the realty of my estate from the accounts pertaining to any and all other thereof.

"Ninth: And from and out of the net income, rents, issues and profits of and from the realty last aforesaid, said trustees shall pay the equal One Third part or portion thereof, in semi-annual or, (at the discretion of said trustees,) more frequent payments, to my said wife, for and during the remainder of her natural life. To have and to hold the amounts herein provided so to be paid, as and for her absolute and separate property,—unto my said wife, her executors, administrators and assigns forever.

"Tenth: And the remaining Two Thirds of the net income, rents, issues and profits of and from said realty, during the natural life of my said wife, and, after her death, the entire net sum thereof, shall be by my said trustees included in one fund with the net income and revenue of and from all my estate other than such realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than six months, divided into as many equal parts as there shall be then *in esse* any of my children by my said wife and shall be by said trustees paid to my said children, from and after their respective majority or marriage, share and share alike: Provided, that if any of my said children shall decease, leaving lawful issue, such issue shall stand in the place or places of his, her, or their parent or parents in all respects concerning the division, payment and receipt of the fund herein mentioned; and further provided that during the minority of said children respectively, and while they shall respectively remain unmarried, within such minority, said trustees shall provide him her or them being so minor and unmarried, with suitable maintenance and education, and funds for foreign travel, in so far as the same shall be suitable and desirable to their means and condition; and all sums expended under this provision shall be charged to Family Maintenance, and none of it shall be charged to said children, or any of them, individually. And any surplus revenues arising or remaining under the provisions of this paragraph, shall become a part of the principal of my estate, and shall be invested and reinvested as such. The sums expended for family maintenance hereunder shall not be reckoned as a part of such net income as herein provided.

"Twelfth: It being my purpose herein to provide a safe and certain income and maintenance for my wife, our children and grandchildren, for and during the period of the trusts hereby established, I do will and direct that each female beneficiary hereunder shall receive and hold all moneys and other rights and privileges herein provided for, free from the debts and control of any husband
249 she may have after the date of the execution of this will,—and that the trustees herein named, and their successors in trust hereunder shall keep intact my estate, and administer the same

under the name of 'The Estate of James Campbell,'—and that the realty thereof, (except as herein provided in the case of said residence premises) shall be particularly and especially preserved intact, and shall be aliened only in the event, and to the extent, that the obvious interests of my estate shall so demand.

"Sixteenth: The provision herein made for my wife is intended, and shall be by her accepted, (if at all,) in lieu and full satisfaction of her dower interest in my estate. The word 'issue' as used herein, is intended to mean, and signifies, all persons lawfully descended from any of my said children as a common ancestor."

In the main, the will as a whole is clear and free from any serious difficulty as to its meaning. There is a marked distinction between the duties of the executors and of the trustees, which distinction is of importance in considering the matters involved. The desire to conserve the estate and provide at all times sufficient funds for the maintenance of the widow and children is clearly indicated all through the will. With these few observations we will now proceed to discuss the questions involved.

1. Is the legacy to the widow payable (*a*) out of the cash on hand at the death of testator and proceeds of personalty subsequently converted by the executrix and executors, or (*b*) out of the cash on hand at the death of testator and proceeds of personalty subsequently converted as well as the net income from the realty and personalty of the estate or either of them?

The legacy was paid from cash on hand and income from all sources, which course was approved by the circuit judge. We have no doubt that the executrix and executors acted in accordance with the intention of the testator as expressed in the will. The will provided that the legacy should be paid in cash, and "if the condition and interests of my estate shall not warrant the payment of the entire sum hereby contemplated at one time then my executrix and executors shall pay the same as rapidly as the income and interests of my estate shall permit without the sale of any real estate or the sacrifice of any personal property as a means of raising such sum provided that the entire sum shall be paid within two years." The fact that payment was to be made without the sale of any real estate or sacrifice of personal property and two years were allowed within which to make it as the income and interests of the estate (which means the estate as a whole) warranted, shows very clearly the intention of the testator. Before the distribution of the estate to the trustees no distinction whatever is made by the testator as to income whether from personalty, from realty or from any other source. The testator evidently believed that with the cash that would be left at his death, together with the large income of the estate, this payment could be made in two years' time without the disposal of any of the property. This belief was justified as shown by the facts after the testator's death. The ruling of the circuit judge on this point should be affirmed.

2. Should the sum of $46,000 paid by the executrix and executors for maintaining and repairing the Emma street and Waikiki residences be charged against the principal of the personalty of the estate or the income thereof or against the realty or income thereof?

It was held by the circuit judge that this sum should be charged against the gross income from realty. The will provides that the residences shall be maintained in suitable condition and repair at the charge "of my estate" for the use of those entitled to occupy the same. During the administration period, as already pointed out, the will makes no distinction between income from realty and income from personalty, and in the absence of any particular direction to the contrary it would seem that this expense should be paid out of the general income of the estate. Moreover, as the testator has directed that such expense should be at the charge of his whole estate, that settles the matter. The ruling of the circuit judge on this question should be reversed.

3. Should the sum of $93,000 expended by the executrix and executors for family allowance and approved by the circuit judge sitting in probate be charged to principal or income of per-
251 sonalty or to income from realty or out of all three of any two of such funds, and did such family allowance cease upon the discharge of the executrix and executors?

The circuit judge held that this sum was chargeable against the income from all sources, that is from both personalty and realty, and that such allowance should cease upon the discharge of the executrix and executors. The direction of the will is to pay to the widow for the use of herself and children as a family allowance such sum as may be approved by the probate court. This sum has been so approved, and it is only a question of whether it should be charged to any particular fund. As no specific fund was named it was properly paid out of the income from all sources. It is also clear that this family allowance, so far as the executrix and executors are concerned, ceased upon their discharge, as the will directs that the trustees shall make further provision for the maintenance of the children, and obviously the executrix and executors could not make payments under the will after they had been discharged as such. The ruling of the circuit judge on this point is affirmed.

4. Should the sum of $85,000 expended by the executrix and executors for expenses in connection with the realty, such as executors' commissions on income from realty, insurance, taxes, water rates, alterations to buildings other than homesteads, etc., be charged against principal or personalty or against income thereof or against the income of the realty?

The holding of the circuit judge that this should be charged against the income from the realty was probably based on the fact that the trustees were directed to keep separate accounts of income from realty and income from personalty. But, as already pointed out, until the discharge of the executrix and executors no distinction is made in the income whether derived from realty or from personalty. The will provides that the executrix and execu-
252 tors are to take possession of and manage the estate and collect the income therefrom pending distribution. Like any other expense of administration, in the absence of direction in the will to the contrary, it should be paid out of the gross income from all sources. The decree on this point should be reversed.

5. Should the sum of $3715.95 expended by the widow prior to the discharge of the executrix and executors (over and above the family allowance of $1500 monthly) for the traveling expenses of two of her children constitute a proper charge against the estate?

This amount was allowed and approved on the final settlement of the accounts and constituted an allowance for the family in addition to the $1500 monthly. We see no reason in this suit for setting aside such allowance and approval. The decree on this point is affirmed.

6. Are the sums directed by the will to be paid by the trustees for maintenance of the children chargeable against the balance of the income of the estate before or after deducting the widow's one-third part of the net income of the realty?

Paragraph 8 of the will directs the accounts pertaining to the realty of the estate to be kept separate and apart from the accounts pertaining to the balance. Paragraph 9 directs payment to the widow of one-third of the net income from the realty. Paragraph 10, after providing as to the balance of the income from realty together with the income from all other sources, directs the trustees in a proviso to provide the minor and unmarried children with suitable maintenance and then says, "and all sums expended under this provision shall be charged to family maintenance, and none of it shall be charged to said children, or any of them, individually. * * * The sums expended for family maintenance hereunder shall not be reckoned as a part of such net income as herein provided." The question is whether or not this family maintenance is charged against any particular part of the income, that is, whether
253 in the last sentence of paragraph 10 of the will the words "such net income as herein provided" mean the net income referred to in paragraph 10. In the first place there is an absolute direction to keep separate and apart the accounts pertaining to the realty. Then there is a provision with no limitation or qualification to pay one-third of the net income from realty to the widow for life. And then comes a provision relating to the disposition of the balance of the income from realty together with the income from all other sources, namely, that it shall be divided into as many equal parts as there shall then be children *in esse* and paid to said children from and after their respective majority or marriage. This last provision is qualified and limited by the direction to provide family maintenance for the minor unmarried children. The provision for family maintenance being a limitation on the general direction to divide a certain part of the income for the children cannot be held to qualify the previous absolute direction to pay the widow one-third of the net income from the realty, particularly in view of the further provision that the trustees shall keep separate the accounts as to realty and personalty, which separation of the accounts by the trustees begins on the discharge of the executors. Therefore, the widow is to be paid her share of the net income of the realty before any family maintenance is deducted. The decree should be reversed on this point.

7. Are the widow and children entitled to any share of the net

income provided for in the ninth and tenth clauses of the will pending the closing of administration?

We have no hesitation in answering this question in the negative. It is only after the administration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income and it is only from that time that the accounts are to be kept separate and the income apportioned.

8. Are the shares of the unmarried minor children vested or contingent?

254 The will in paragraph ten directs that two-thirds of the net income from the realty, together with all the net income from the personalty, shall be included in one fund, which fund shall at least once every six months be "divided into as many equal parts as there shall be then *in esse* any of my children by my said wife and shall be by said trustees paid to my said children from and after their respective majority or marriage share and share alike. * * * And any surplus revenues arising or remaining under the provisions of this paragraph shall become a part of the principal of my estate, and shall be invested and reinvested as such." In our opinion these interests are contingent. The vesting is postponed until majority or marriage. This is consistent with a general view of the whole will. In case of the death of any minor unmarried child such portion of the accumulated income that would otherwise go to such child on majority or marriage then becomes surplus revenue referred to by the testator and is to be added to the principal of the estate. The sentence as to surplus revenues would be useless and unnecessary if the interests of the minor unmarried children were vested.

The decree appealed from is affirmed except as to questions 2, 4 and 6 and as to those questions it is reversed.

(Signed) W. F. FREAR.
(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.

HOLMES & STANLEY,
For plaintiffs.
A. G. M. ROBERTSON,
J. J. DUNNE,
R. W. BRECKONS,
E. C. PETERS AND
E. M. WATSON,
For Defendants.

(Endorsed:) Supreme Court Territory of Hawaii. Abigail K. Campbell Parker, *et al.* Trustees under the Will and of the Estate of James Campbell, deceased *vs.* Abigail K. Campbell Parker, *et al.* Opinion. Filed October 29, 1906, at 10 o'clock A. M. J. A. Thompson, Clerk.

255 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased,

v.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor and —— KAWANANAKOA, a Minor.

Bill for Construction of Will.

Appeal from Circuit Judge, First Circuit.

Petition for Rehearing.

Now comes Abigail W. Kawananakoa, one of the above named respondents, by J. J. Dunne and C. F. Peterson, her attorneys, and petitions said Court for a rehearing of the above entitled cause and that the decision of said Court rendered and filed herein on the 29th day of October, 1906, be amended and extended as hereunder set forth, and bases her petition upon the record in said cause, and particularly upon the following grounds:

First.

That the Court, in considering and passing upon question 7, viz: "Are the widow and children entitled to any share of the net income provided in the ninth and tenth clauses of the will pending the closing of administration",
and in deciding the same as follows:

"We have no hesitation in answering this question in the negative. It is only after the administration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income and it is only from that time that the accounts are to be kept separate and the income apportioned"

overlooked and did not duly consider or give proper weight

256 or effect to clause ten of the will of the testator wherein it is provided that "the remaining two-thirds of the net income, rents, issues and profits of and from said realty, during the natural life of my said wife, and, after her death, the entire net sum thereof, shall be by my said trustees included in one fund with the net income and revenue of and from all my estate other than such realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than six months, divided into as many equal parts as there shall be then *in esse* any of my children by my said wife, and shall be by said trustees *paid to my children, from and after their respective majority or marriage*, share and share alike".

Second.

That said decision on said point is open to two constructions; one, that although "the widow and children are not entitled to any share of the net income provided for in the ninth and tenth clauses of the will pending the closing of administration", yet they are entitled to the payment of all income after close of administration, whether such income accrued before or after the closing of such administration; and the other, that the widow and children, under said clauses, are only entitled to income which *accrued* after the closing of administration and not to income earned and paid to said trustees covering the period between the death of the testator and the closing of administration; and the parties hereto are still in doubt as to what their rights and duties are under said clauses, and as to whether said decision means that the wife, and children who have become of age or have married, are entitled to a share of the net income which accrued between the date of death of the testator and the taking hold of the estate by said trustees, and that it is only the *payment* of such income which is postponed; or whether it is meant by the court that the balance of such income which accrued before the trustees took hold and which was paid over to such trustees by
257 the executors and executrix thereupon became a part of the corpus of said estate and that said wife and children are only entitled to income earned and accrued *after* said trustees took hold of said estate.

Intimately connected with this point is the question "When did the trustees take hold of said estate and become, for any purpose, authorized to act concerning any of the provisions of the will?" Was it (*a*), at the date of the death of the testator, April 21, 1900; (*b*), at the date when the legacy to the widow (of one-third the value of the personal property) was finally paid, February 10, 1902; (*c*), at the date of the *filing* of the final accounts and petition for discharge by the executors, August 25, 1902; (*d*), at the date when the decree of distribution was *signed* by the Circuit Judge, July 3, 1905; or, (*e*), was it at such time when the administration *should have been*, but was not in fact, *closed*, owing to the delays of obtaining hearings, awaiting decisions approving such accounts, remodeling and filing new accounts to conform to such decisions, and other delays for which this respondent is not responsible. Although this question was not separately asked the Circuit Judge in the bill for construction of the will, yet it is so intimately connected with the questions asked and with the proper and correct administration of the trusts that this respondent feels it can be properly passed upon by this Court at this time to avoid further litigation, delays and misunderstanding; and it is the desire of all parties hereto that this question be settled without having to go again to the Circuit Judge. And respondent urges that the last proposition is the correct one, wherein it is claimed that the date when such trustees should have taken hold was when the administration should have been, but was
258 not in fact, closed, namely, when the legacy to the widow was paid. The final accounts and petition for discharge were filed August 25, 1902, but because of delay in securing a

decision approving the same and ordering the discharge of the executors and of having to alter such accounts to conform to such decision, an appeal to this Court, and the time necessarily taken for a decision of such appeal, the final decree of distribution was not obtained until July 3, 1905. The final accounts should have been filed immediately after February 10, 1902, upon the final payment of the legacy to the widow, there being then no other necessary disbursement to be made by the executors. This is the date when the trustees should have begun to pay this respondent her share of the income under the will, such income to include, however, the period from January 1, 1901, when respondent reached majority. Furthermore, the fact that the trustees did not take hold sooner, should not deprive this respondent of her share of the income after she reached majority. A person will not be deprived of a benefit under a will merely because there is no trustee to carry out the terms of the will.

Third.

That a matter highly material and vital to the interests of all concerned herein was not considered or decided by the Court, in its said decision, although the same was comprehended in said question, viz.: Whether, although payment may be a function of the trustees, such payment, when made, shall be made,—that is to say,—computed, from and after majority or marriage of said children. And in this connection, petitioner respectfully calls attention to the phrase "begin to share" in the above excerpt from the opinion of this Court and points out that the point of time from which the amount to be paid upon the beginning of the sharing in the income is to be computed, is not determined by the Court, al-
259 though that matter was referred to in the brief filed on behalf of this applicant, on pages fifty-nine and sixty thereof.

And this petitioner, with other parties to said cause, urges that it would be in the interests of justice and of a correct administration of the trust, to obtain a ruling of the Court upon said question. That as matters now stand, all of the parties hereto are at sea as to what their rights and duties are, and a few words added to the decision of this Court will make clear to said parties how they shall proceed with the administration of said estate, and will obviate the necessity of asking for further instructions upon this point from the Circuit Judge, and the possibility of another appeal to this Court, and the consequent delay and hardship to the beneficiaries under said will caused by such delay.

Respectfully submitted.

ABIGAIL W. KAWANANAKOA.
By J. J. DUNNE,
C. F. PETERSON, *Her Attorneys.*

Dated, Honolulu, November 17, 1906.

We, J. J. Dunne and C. F. Peterson, attorneys for Abigail W. Kawananakoa, the above named respondent, hereby certify that in our opinion, the foregoing petition is well founded in point of law.

that it is made in good faith, and that it is not interposed for the purposes of delay.

Dated November 17, 1906.

J. J. DUNNE,
C. F. PETERSON.

I, the undersigned, one of the above named respondents, do hereby join in the above and foregoing petition for rehearing and
260 respectfully pray that the same may be granted.

ALICE K. MACFARLANE,
By R. W. BRECKONS,
Her Solicitor.

To Abigail K. Campbell Parker and A. G. M. Robertson, her attorney; Abigail K. Campbell Parker, J. O. Carter and Cecil Brown, trustees under the will and of the estate of James Campbell, deceased and Messrs. Holmes & Stanley, their attorneys; Alice K. Macfarlane, and R. W. Breckons, her attorney; Muriel K. Campbell, a minor, and Beatrice U. (Mary) Campbell, a minor, and E C. Peters, their guardian *ad litem* and attorney; Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor and —— Kawananakoa, a minor and E. M. Watson, their guardian *ad litem* and attorney:

Please take notice that the foregoing petition for rehearing will be presented to the Supreme Court of the Territory of Hawaii at the Judiciary Building in Honolulu, Oahu, on Monday, November 26, 1906, at ten o'clock A. M., or as soon thereafter as counsel may be heard.

Dated Honolulu, November 17, 1906.

J. J. DUNNE,
C. F. PETERSON,
Attorneys for Abigail W. Kawananakoa.

(Endorsed:) Equity. In the Supreme Court of the Territory of Hawaii. October Term, 1906. Abigail K. Campbell Parker *et al.* *v.* Abigail K. Campbell Parker *et al.* Bill for Construction of Will. Appeal from Circuit Judge. Petition for Rehearing. Filed November 19, 1906 at 3.58 P. M. J. A. Thompson, Clerk. J. J. Dunne, and C. F. Peterson, Attorneys for Petitioner.

261 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

No. 31.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased,

v.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor.

Petition for Rehearing.

Filed November 14, 1906, Decided November 23, 1906.

This is a petition for rehearing by Abigail W. Kawananakoa, Alice K. Marfarlane also requesting the same, of the decision which was reported in 18 Haw. —, so far as it relates to the following question, namely: "Are the widow and children entitled to any share of the net income provided in the ninth and tenth clauses of the will pending the closing of administration." The grounds for rehearing are that the court overlooked and did not consider certain portions of the will and that the decision on the question is open to two constructions and is not clear. *Per curiam.* This matter was fully argued in the briefs, all the arguments were considered by the court, and no portion of the will was overlooked. The court decided and intended to decide that the widow and children are not entitled at any time to any share of the net income referred to in the ninth and tenth clauses of the will pending the closing of administration. A reexamination of the matter strengthens that view. The

262 petition for rehearing is denied without argument. Rule 5.

J. J. Dunne, C. F. Peterson and R. W. Breeksons for petitioners.

By the Court:

J. A. THOMPSON, *Clerk.*

(Endorsed:) Supreme Court Territory of Hawaii. Abigail K. Campbell Parker *et al.* Trustees under the Will and of the Estate of James Campbell, dec'd *vs.* Abigail K. Campbell Parker *et al.* Opinion on Petition for Rehearing. Filed November 23, 1906. J. A. Thompson, Clerk.

263 In the Supreme Court of the Territory of Hawaii, October Term A. D. 1906. October Session A. D. 1906.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased.

v.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor.

Decision Upon Appeal from the Circuit Judge, First Circuit.

The Court having heard and considered the questions of law raised by the appeal taken by the defendants herein against the decree made by the Court below, the decree appealed from is affirmed, except as to questions 2, 4 and 6, and as to those questions, it is reversed.

Dated, Honolulu, November 14, 1906 as of the 29th day of October, 1906.

By the Court:

J. A. THOMPSON,
Clerk Supreme Court.

(Endorsed:) Supreme Court, Territory of Hawaii. October Term, A. D. 1906. October Session A. S. 1906. Abigail K. Campbell Parker *et al. v.* Abigail K. Campbell Parker *et al.* Decision. Filed November 14, 1906. J. A. Thompson, Clerk.

264 In the Supreme Court of the Territory of Hawaii, October Term 1907.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Appeal.

Now comes Abigail K. Campbell-Parker, one of the respondents in the above entitled cause, and, conceiving herself aggrieved by the decision of the above entitled Court rendered on the 14th day of November 1906, in the above entitled cause, does hereby appeal from said decision to the Supreme Court of the United States, and prays

that this appeal may be allowed, for the reasons specified in the assignment of errors; and that a transcript of the record and proceedings and papers upon which said decision was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, Honolulu, February 27, 1908.

A. G. M. ROBERTSON,
Attorney for the Appellant.

And now, to wit, on the 27th day of February 1908, it is ordered that the appeal be allowed as prayed for.

[Seal Supreme Court Territory of Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

265 In the Supreme Court of the United States.

ABIGAIL K. CAMPBELL PARKER, Appellant,
vs.
ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. MARY CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Appellees.

Citation on Appeal.

[Seal Supreme Court Territory of Hawaii.]

UNITED STATES OF AMERICA, *ss:*

To Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, Abigail W. Kawananakoa, Alice K. Macfarlane, Muriel K. Campbell, a minor, Beatrice U. Mary Campbell, a minor, Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, and —— Kawananakoa, a minor, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal, filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause where Abigail K. Campbell Parker, is appellant, and you Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, Abigail W.
266 Kawananakoa, Alice K. Macfarlane, Muriel K. Campbell, a minor, Beatrice U. Mary Campbell, a minor, Abigail Helen

Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, and —— Kawananakoa, a minor, are appellees, to show cause, if any there be, why the decision in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties on that behalf.

Witness the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii this 27th day of February, in the year of Our Lord one thousand nine hundred and eight.

[Seal Supreme Court Territory of Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the foregoing Appeal and Citation and the receipt of a copy thereof admitted this 27th day of February, 1908.

HOLMES & STANLEY,
C. H. OLSEN,
Attorneys for Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will of James Campbell, Deceased.

ALICE K. MACFARLANE,
In Person.

CHARLES F. PETERSON,
Attorney for Abigail W. Kawananakoa.

E. C. PETERS,
Guardian ad Litem of Muriel K. Campbell and Beatrice C. (Mary) Campbell, Minors.

E. M. WATSON,
Guardian ad Litem of Abigail Kapiolani Kawananakoa, David Kalakaua Kawananakoa, and —— Kawananakoa, Minors.

267 [Endorsed.] Supreme Court of the United States. Abigail K. Campbell Parker, Appellant, *vs.* Abigail K. Campbell Parker, *et als.*, Appellees. Appeal and Citation on Appeal. Filed February 27, 1908 at 11:20 o'clock A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii.

268 In the Supreme Court of the United States.

ABIGAIL K. CAMPBELL PARKER, Appellant,

vs.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased; ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. MARY CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Appellees.

On Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes Abigail K. Campbell Parker, the appellant in the above entitled cause, and says that in the record of the proceedings in said suit in the Supreme Court of the Territory of Hawaii, there is manifest error in this to wit:

1. That the Supreme Court of the Territory of Hawaii erred in holding that "It is only after the administration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income."

2. That the Supreme Court of the Territory of Hawaii erred in deciding that this appellant is not entitled under the ninth
269 clause of the will of James Campbell, deceased, to any share of the income of the realty of the estate pending the closing of the administration of the estate.

3. That the Supreme Court of the Territory of Hawaii erred in deciding that none of the children of the testator are entitled under the tenth clause of the will of James Campbell, deceased, to any share of the income of the estate pending the closing of the administration of the estate.

4. That the Supreme Court of the Territory of Hawaii erred in affirming the decree of the Circuit Judge of the First Circuit Court as to the 7th question decided.

Wherefore, this appellant, Abigail K. Campbell Parker, prays that the decision of said Supreme Court of the Territory of Hawaii rendered in the above entitled cause on the 29th day of October, 1906, be reversed, and the said Supreme Court of the Territory of Hawaii be ordered to enter a decree instructing the trustees under the will of James Campbell, deceased, that this appellant, Abigail K. Campbell Parker, and the children of said James Campbell, deceased, are entitled under the 9th and 10th clauses of said will to their respective shares of the income of said estate from and after the date of the last act of the executors and executrix of said will in the administration of said estate, to wit, the 10th day of February, 1902; and that in contemplation of law the administration of said estate was closed on said date.

A. G. M. ROBERTSON,
Attorney for Appellant.

Dated, Honolulu, February 27, 1908.

270 [Endorsed:] Supreme Court of the United States. Abigail K. Campbell Parker, Appellant, *v.* Abigail K. Campbell Parker *et al.*, Appellees. Assignment of Errors. Filed February 27, 1908, at 11.20 o'clock a. m. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii. A. G. M. Robertson, Att'y for Appellant.

271 In the Supreme Court of the Territory of Hawaii. October Term, 1907.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Affidavit of George L. Bigelow.

UNITED STATES OF AMERICA,
Territory of Hawaii, Honolulu, ss:

George L. Bigelow, being first duly sworn, on oath deposes and says:

That he is the cashier and book-keeper for Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased; that he is familiar with the accounts of said Trustees, is acquainted with the condition of said Estate, and knows the amount of income derived from the property, funds and investments of said Estate; that the net income derived from the real property belonging to said Estate from February 10, 1902, to July 3, 1905, amounted to about $236,684.47; that the net income derived from the personal property belonging to said Estate from February 10, 1902, to July 3, 1905, amounted to about $23,921.81.

(Sig.) GEO. L. BIGELOW.

Subscribed and sworn to before me this 26th day of February, A. D. 1908.

[N. S.] (Sig.) H. C. CARTER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Endorsed: Supreme Court of the Territory of Hawaii. October Term, 1907. Abigail K. Campbell Parker *et al.*, Trustees, *v.* Abigail K. Campbell Parker *et als.* Affidavit of George L. Bigelow. Filed February 27, 1908, at 11.20 o'clock a. m. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii.

272 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; and —— KAWANANAKOA, a Minor, Respondents.

Bond on Appeal.

Know all men by these presents: That we, Abigail K. Campbell Parker, of Honolulu, Hawaii, principal, and Samuel Parker, of the same place, surety, are held and firmly bound unto the above named Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, in the sum of Five Hundred ($500.) Dollars to be paid to said Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees aforesaid, for the payment whereof well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents.

The condition of this obligation is such that whereas the said Abigail K. Campbell Parker has prosecuted an appeal to the Supreme Court of the United States to reverse the decision rendered in
273 the above entitled cause by the Supreme Court of the Territory of Hawaii:

Now, therefore, the condition of this obligation is such, that if the said Abigail K. Campbell Parker shall prosecute said appeal to effect and answer all damages and costs if she fail to make said appeal good, then this obligation shall be void, otherwise of full force and virtue.

Dated, Honolulu, February 27, 1908.

(Sig.) ABIGAIL K. CAMPBELL PARKER.
(Sig.) SAMUEL PARKER.

Endorsed: Supreme Court Territory of Hawaii. October Term 1907. Abigail K. Campbell Parker *et al.*, Trustees *v.* Abigail K. Campbell Parker *et als.* Bond on Appeal. Filed February 27, 1908, at 14:20 o'clock A. M. J. A. Thompson Clerk Supreme Court Territory of Hawaii.

274 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

No. 165.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; and —— KAWANANAKOA, a Minor, Respondents.

Bill for Construction of Will.

Præcipe Designating Parts of Record to be Included in Transcript.

To J. A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You are hereby requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii in the above entitled cause to be filed in the Supreme Court of the United States pursuant to the appeal of Abigail K. Campbell Parker allowed in said cause and to include in such transcript of record the following and no other papers and exhibits, to-wit:

1. Petition for Construction of Will annexed thereto as part thereof is copy of the Will of James Campbell, deceased.
2. Answer of Abigail K. Campbell Parker,
3. Answer of Alice K. Macfarlane,
4. Answer of Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa and —— Kawananakoa, Minors,

275 5. Answer of Abigail W. Kawananakoa,

6. Answer of Muriel K. Campbell and Beatrice U. (Mary) Campbell, Minors.
7. Transcript of Testimony,
8. Circuit Court Clerk's Minutes, dated March 23, April 2 and May 15, 1906,

(also the following extracts from the record in the probate proceedings in the Matter of the Estate of James Campbell, Deceased, "Probate Division Number 3404," said record having been offered and received in evidence and Marked Petitioners' Exhibit "A" in the above entitled cause, being numbered from 9 to 41 both inclusive in this Præcipe set forth), to-wit:

9. Petition for Probate of Will of James Campbell, Deceased, filed April 20, 1900,
10. Order admitting Will to probate, dated June 26, 1900,
11. Bond of Executrix and Executors filed June 29, 1900,

12. Letters Testamentary filed June 29, 1900.

13. Petition of Executrix and Executors for allowance of accounts, final distribution and discharge, dated August 25, 1902.

14. Schedule "C" to Accounts filed August 25, 1902.

15. Recapitulation.

16. Order of Notice of hearing petition for allowance of accounts etc., filed August 25, 1902.

17. Affidavit of publication of Notice of hearing petition for allowance of accounts etc.,

18. Master's Report filed November 5, 1902.

19. Decision of Hon. Geo. D. Gear, filed June 12, 1903.

20. Notice of Appeal and Appeal by Executrix and Executors from decision of Hon. Geo. D. Gear, filed June 12, 1903.

21. Schedule "C" to Supplementary account, filed June 29, 1903.

22. Clerk's Minutes Circuit Court, dated Aug. 8, 18 and 31, 1900, April 21, May 13, 15, 22 and June 20, 1905.

23. Petition of Executrix and Executors for approval of accounts filed January 4, 1904.

24. Schedule "C" to Supplementary account filed January 4, 1904.

25. Master's Report filed March 8, 1904.

26. Order for hearing on Master's Report filed May 4, 1904.

27. Schedule "C" to Supplementary account filed May 14, 1904.

28. Master's Report filed May 17, 1904.

29. Exceptions filed May 17, 1904, by Executrix and Executors to the Master's Report filed March —, 1904.

30. Exceptions of Cecil Brown one of the Executors to findings of Master.

31. Decision of Hon. Geo. D. Gear on final accounts filed July 25, 1904.

32. Order dated August 1, 1904 in accordance with decision rendered by Hon. Geo. D. Gear on June 12, 1903 and July 25, 1904.

33. Notice of Appeal of Executrix and Executors from the Order of Hon. Geo. D. Gear dated August 1, 1904.

34. Opinion of the Supreme Court rendered March 8, 1905.

35. Remittitur.

276 36. Schedule "C" to Final Supplementary Account filed April 17, 1905.

37. Notice to J. J. Dunne, Esq., counsel for Abigail W. Kawananakoa of hearing on final Supplementary account, dated April 18, 1905.

38. Master's Report filed May 3, 1905.

39. Order approving accounts and discharge of Executrix and Executors, dated July 3, 1905.

40. Receipt of Trustees to Executrix and Executors, and

41. Bond of Trustees.

42. Decree of Hon. Alexander Lindsay, Jr., entered June 25, 1906.

43. Notice of Appeal and Appeal of Abigail K. Campbell Parker.

44. Notice of Appeal and Appeal of Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa and —— Kawananakoa, Minors.

45. Notice of Appeal and Appeal of Abigail W. Kawananakoa,
46. Notice of Appeal and Appeal of Muriel K. Campbell and Beatrice U. (Mary) Campbell, Minors,
47. Notice of Appeal and Appeal of Alice K. Macfarlane,
48. Opinion of the Supreme Court rendered October 29, 1906,
49. Petition of Abigail W. Kawananakoa for rehearing in the Supreme Court and Notice of Petition,
50. Opinion of the Supreme Court on the Petition for rehearing rendered November 23, 1906,
51. Decision Supreme Court,
52. Appeal of Abigail K. Campbell Parker one of the respondents to the United States Supreme Court and Order allowing appeal,
53. Citation to Appellees and acknowledgment of service thereof,
54. Assignment of Errors,
55. Affidavit of George L. Bigelow as to value, and
56. Bond on Appeal.

Dated, Honolulu, Oahu, March 4th 1908.

A. G. M. ROBERTSON,

Attorney for Abigail K. Campbell Parker, Appellant.

Endorsed: Supreme Court Territory of Hawaii. October Term, 1907. Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants, *vs.* Abigail K. Campbell Parker, Abigail W. Kawananakoa, Alice K. Macfarlane, Muriel K. Campbell, a Minor, Beatrice U. (Mary) Campbell, a Minor, Abigail Helen Kapiolani Kawananakoa, a Minor, David Kalakaua Kawananakoa, a Minor, and —— Kawananakoa, a Minor, Respondents. Praecipe designating parts of record to be included in Transcript. Filed March 4, 1908, at 11:10 o'clock A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii.

277 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor, Respondents.

Certificate of Clerk to Transcript of Record.

TERRITORY OF HAWAII.
Honolulu, Oahu, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing appeal of Abigail K.

Campbell Parker to the Supreme Court of the United States and in obedience thereto and in pursuance of the Præcipe herein filed a copy of which is hereto attached (being pages 274 to 276 of this Transcript), do hereby certify, that the foregoing pages numbered from 1 to 64 both inclusive and from pages 231 to 263 both inclusive, contain a true and correct transcript of record and proceeding had in the above entitled Court in the case entitled "Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, Complainants against Abigail K. Campbell Parker, Abigail W. Kawananakoa, Alice K. Macfarlane, Muriel K. Campbell, a Minor, Beatrice
278 U. (Mary) Campbell, a Minor, Abigail Helen Kapiolani Kawananakoa, a Minor, David Kalakaua Kawananakoa, a Minor and —— Kawananakoa, a Minor, Respondents":

I further certify that the foregoing pages numbered from 65 to 230*a* both inclusive contain true and correct copies of the originals being extracts from the Record in the probate proceedings had in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in the Matter of the Estate of James Campbell, Deceased, (Probate Division Numbered 3404), which record was offered and received in evidence and Marked Petitioners' Exhibit "A" in the above entitled cause;

I further certify that the foregoing page numbered 271 and pages 272 and 273 contain true and correct copies of the "Affidavit of George L. Bigelow as to value," and "Bond on Appeal," and that *that* the Original Appeal and Citation to Appellees and Acknowledgment of service thereof (being pages 264 to 267 of this Transcript) and the Original Assignment of Errors (being pages 268 to 270 of this Transcript) are hereto attached and herewith returned.

In testimony whereof I have caused the Seal of said Supreme Court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory this 4th day of March, A. D. 1908.

[Seal Supreme Court Territory of Hawaii.]

JAMES A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 21,076. Hawaii Territory Supreme Court. Term No. 106. Abigail K. Campbell Parker, appellant, *vs.* Abigail K. Campbell Parker, Joseph O. Carter, and Cecil Brown, trustees under the will and of the estate of James Campbell, deceased, *et al.* Filed March 19th, 1908. File No. 21,076.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 107.

ABIGAIL K. CAMPBELL PARKER, APPELLANT,

vs.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, AND CECIL BROWN, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED MARCH 19, 1908.

(21,077.)

(21,077.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 107.

ABIGAIL K. CAMPBELL PARKER, APPELLANT,

vs.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, AND CECIL BROWN, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

INDEX.

	Original.	Print.
Proceedings in circuit court of the first judicial circuit, Territory of Hawaii	1	1
Bill of complaint	1	1
Exhibit A—Copy of the will of James Campbell, deceased	13	8
Exhibit B—Opinion of the supreme court of Hawaii, December 29, 1906	24	14
Order appointing guardians *ad litem*	35	22
Demurrer of Alice E. K. Macfarlane	36	23
Demurrer of Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa, and Lydia Liliuokalani Kawananakoa, minors	38	24
Decree of Hon. W. J. Robinson, entered April 20, 1907	40	26
Notice of appeal of Abigail K. Campbell Parker, Joseph O. Carter, and Cecil Brown, executrix and executors and trustees under the will and of the estate of James Campbell, deceased	42	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1909.

	Original.	Print.
Request for a substitute justice	44	28
Opinion of the supreme court, rendered June 14, 1907	45	29
Decree of the supreme court, entered June 19, 1907	53	33
Appeal of Abigail K. Campbell Parker, one of the respondents, to the United States Supreme Court and order allowing appeal	54	34
Citation to appellees and acknowledgment of service thereof	55	35
Assignment of errors	58	36
Affidavit of George L. Bigelow as to value	60	38
Bond on appeal	61	39
Certificate of clerk to transcript of record	63	40

1 In the Circuit Court of the First Judicial Circuit Territory of Hawaii, at Chambers. In Equity.

(Stamps $2.)

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees under the Will and of the Estate of JAMES CAMPBELL, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Bill of Complaint.

To the Honorable J. T. DeBolt, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, or other Judge of the said Court, presiding at Chambers.

Humbly complaining, show unto your Honor, Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, deceased, complainants herein, as follows:

I.

That the said James Campbell died on or about the 21st day of April, 1900, seized and possessed of a considerable estate both real and personal, situate in the Territory of Hawaii and else-
2 where, and leaving a last Will and Testament, duly executed and published on the 8th day of July, 1896, in which the said Abigail K. Campbell Parker, then Abigail K. Campbell, Joseph O. Carter and Cecil Brown, were and are named as Executrix and Executors thereof respectively, and Trustees a true copy of which said last Will and Testament is hereunto annexed, made a part hereof and marked Exhibit "A."

II.

That on the 26th day of June, 1900, the said last Will and Testament was duly admitted to probate by a Judge of the Circuit Court of the First Judicial Circuit, of the Territory of Hawaii, Sitting at Chambers in Probate, and Letters Testamentary were duly issued to the said Abigail K. Campbell Parker (then Abigail K. Campbell) Joseph O. Carter and Cecil Brown as such Executrix and Executors respectively.

III.

That said James Campbell, deceased, left surviving him a widow, Abigail K. Campbell Parker, who thereafter was and is now married to one Samuel Parker, of Honolulu aforesaid, and who, under the name of Abigail K. Campbell Parker is one of the respondents herein; and as his heirs at law and next of kin, four daughters, to wit, Abigail W. Kawananakoa, formerly Abigail W. Campbell, and now the wife of David Kawananakoa, of Honolulu aforesaid; Alice K. Macfarlane, formerly Alice K. Campbell, and now and ever since June 21, 1905, the wife of Walter Macfarlane of Honolulu aforesaid; Muriel K. Campbell and Beatrice U. Campbell, described in the said Will of Mary Campbell; all residents of Honolulu aforesaid, respondents herein; that the respondent Abigail W. Kawananakoa attained her legal majority on the first day of Jan-
3 uary, 1901; that the respondent Alice K. Macfarlane, on the 17th day of March, 1902, attained her legal majority; and that the respondents Muriel K. Campbell and Beatrice U. (Mary) Campbell are minors and of the age of sixteen years and thirteen years, respectively.

IV.

That since the death of the said James Campbell, there have been born to the said Abigail W. Kawananakoa three children, to wit, Abigail W. Kawananakoa, a daughter, who was born on the 14th day of March, 1903, David Kalakaua Kawananakoa, a son, who was born on the 10th day of March, 1904, and Lydia Liliuokalani Kawananakoa, a daughter, who was born on the 22nd day of July, 1905, and there has been born to the said Alice Macfarlane one child, to wit, a daughter, who was born on the 16th day of May, 1906, all of whom are named as respondents herein.

V.

That the above named respondents Abigail K. Campbell Parker, Abigail W. Kawananakoa, Alice Macfarlane, Muriel K. Campbell, a minor, Beatrice U. (Mary) Campbell, a minor, Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, Lydia Liliuokalani Kawananakoa, a minor, and Alice E. K. Macfarlane, a minor, are each and all legatees and devisees under and by virtue of the provisions of said Last Will and Testament.

VI.

That said Executrix and Executors, on the 25th day of August, A. D. 1902, filed in said Court their first and final account as such Executrix and Executors, and their petition for the allowance of their accounts as such Executrix and Executors, and for an order to deliver such of the property of the estate as remained in their possession to the persons entitled thereto and discharging them from all further responsibility as such Executrix and Executors; that on the
4 25th day of August, A. D. 1902 an order of notice of hearing of the said petition was made in the matter of said estate, by

the Honorable George D. Gear, Second Judge of the said Court, and the 10th day of October, A. D. 1902, was appointed the day for hearing of said petition; that on the 10th day of October A. D. 1902, hearing was had on the said petition before the said Judge, who ordered the said account of said Executrix and said Executors referred to George A. Davis, Esquire, as Master; that the said Master filed his report on such account on the fifth day of November, A. D. 1902, wherein he "recommended that they be passed and allowed"; that the said Judge, on the 12th day of June, A. D. 1903, filed his decision on the said petition that certain sums, properly payable by said Executrix and executors as Trustees under the said Will of the said deceased and included in the said account were improperly included in the said account of said Executrix and Executors; that on the 29th day of June, A. D. 1903, the said Executrix and Executors as aforesaid, filed an amended account in accordance with the directions contained in such decision; and on the 20th day of July, A. D. 1903, a further hearing on the accounts of said Executrix and Executors was had before the aforesaid Judge Gear.

VII.

That no further action in the premises was had or taken by the aforesaid Judge Gear, and that thereupon, the aforesaid Judge Gear being absent from said Territory, the said Executrix and Executors, on the 11th day of January, A. D. 1904, filed a supplemental account from June 19th to December 31st, 1903, in the Court of the Honorable J. T. DeBolt, First Judge of the aforesaid Circuit Court, and therewith a petition praying the said Judge to allow said accounts; but said Judge, to wit, Honorable J. T. DeBolt, refused to entertain said position or consider said accounts.

VIII.

That thereafter, and during said month of January, A. D. 1904, the aforesaid Judge Gear returned to said Territory, and thereafter said supplemental account of said Executrix and Executors was referred to W. R. Sims, Esquire, as Master, who filed his report on such account on the 8th day of March, A. D. 1904; that on the fifth day of March, A. D. 1904, a hearing was had before the said Judge Gear on said accounts; that on the 14th day of May, A. D. 1904, a supplemental account from January 2nd, 1904, to May 13th, 1904, was filed by said Executrix and Executors; that said Executrix and Executors filed their exceptions to the aforesaid Master's report, and on the 17th day of May, A. D. 1904, and the first day of June, A. D. 1904 hearings were had on the accounts so filed as aforesaid by said Executrix and Executors; and that on the 25th day of July, A. D. 1904, the aforesaid Judge Gear filed his decision approving the accounts of said Executrix and Executors subject to such decision, and on the first day of August, A. D. 1904, an order of decree conformable to such decision was signed by the said Judge Gear and filed, against which order or decree said Executrix and Executors appealed to the Supreme Court of the Territory of Hawaii.

IX.

That said appeal was argued and submitted on the 24th day of February, A. D. 1905, and on the 8th day of March, A. D. 1905, said Supreme Court made and filed its decision modifying said order or decree of said Judge Gear, and on the 6th day of April, A. D. 1905, the said cause was remitted by the said Supreme Court to the said Judge Gear with directions to modify such order or decree.

6 X.

That thereafter, on the 17th day of April, A. D. 1905, the said Executrix and Executors filed a supplemental account, running from May 16th, 1904, to March 31st, 1905, which account was referred to the said W. R. Sims, Esquire, as Master, who thereafter filed his report on the 3rd day of May, A. D. 1905; that on the 3rd day of July, A. D. 1905, an order of Honorable Alexander Lindsay, Second Judge of said Court in succession to the aforesaid Honorable George D. Gear, was filed, approving the accounts of such Executrix and Executors, and directing that the property in the hands of such Executrix and Executors be distributed to said Executrix and Executors as Trustees under the Will and of the estate of the said deceased, and that they be discharged as such Executrix and Executors upon filing their receipt for such property as Trustees under the Will and of the estate of said deceased; and that said Executrix and Executors, having qualified as such Trustees as aforesaid, filed their receipt for such property on the 28th day of July, A. D. 1905.

XI.

That thereafter, to wit, on the 3rd day of August, A. D. 1905, the said Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, as such Trustees under the Will and of the estate of James Campbell, deceased, as complainants, filed their bill for the construction of certain of the provisions of the Will of the said deceased, in the said Court, and in said bill, said Abigail K. Campbell Parker, said Abigail W. Kawananakoa, said Alice K. Macfarlane, Muriel K. Campbell, a minor, Beatrice U. (Mary) Campbell, a minor, Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, and Lydia Liliuokalani Kawananakoa, a minor, were each and all named as respondents; and that all of said respond-
7 ents, having filed their answers to the said bill, a hearing was had thereon before the aforesaid Honorable Alexander Lindsay, Second Judge of the said Court, who filed his decision on the 15th day of May, A. D. 1906, and thereafter, on the 25th day of June, A. D. 1906, an order or decree in conformity with such decision was made and filed in said cause; and that said defendants other than the complainants herein as such trustees duly appealed against said order or decree to the Supreme Court of the Territory of Hawaii; that thereafter such appeal was duly heard and, on the 29th day of October, A. D. 1906, the Supreme Court made and filed its decision modifying said order or decree of the said last mentioned Judge, and the said cause was subsequently remitted to the said

Judge, last hereinabove mentioned, with directions to modify such decree or order in conformity with such decision; and a true copy of said decision of said Supreme Court of the Territory of Hawaii, construing the aforesaid Will, is hereunto annexed, made a part hereof, and marked Exhibit "B."

XII.

That by paragraph Third of said Will the said Testator bequeathed to the said Abigail K. Campbell Parker a sum of money equal to a one-third portion of the sum which should be decreed to be the value of the personal property only of his estate at the time of such decree after payment of his debts and funeral expenses, and directed that such legacy should be paid in cash and that if the condition and interests of his estate should not warrant the payment of the entire sum at one time, then such legacy should be paid as rapidly as the income and interests of his estate should permit, without the sale of any real estate or the sacrifice of any personal property as a means of raising such sum, but expressly provided that the entire sum
8 should be paid within two years from the date of his decease, and no deferred payments should within said period of two years draw any interest.

XIII.

That by paragraph Sixth of the said Will it is provided that upon the full payment and discharge of the debts of the said deceased, his funeral expenses, and the aforesaid legacy, to the said surviving widow, said Executrix and Executors should as soon as might be, conclude the Probate Proceedings under said Will and obtain a decree of distribution of said estate, and by said Paragraph, said Testator devised and bequeathed all of the rest, residue and remainder of his estate not thereinbefore devised or bequeathed to said Executrix and Executors as Trustees in trust among other things to pay one third of the net income from the Real Estate (except only his two residences) to the said Abigail K. Campbell Parker for her life, and to pay the income from the personal property and the remaining two-thirds of the income from the real estate during her life and the whole of such income after her death to his children for their lives as therein mentioned.

XIV.

That the said Executrix and Executors paid all of the debts of the said deceased at the time of his death and funeral and testamentary expenses long prior to the tenth day of February, A. D. 1902; and on the 10th day of February, A. D. 1902, said Executrix and Executors paid to the said Abigail K. Campbell Parker, as the widow of said deceased, the final balance of the aforesaid legacy of a sum of money equal to a one-third proportion of the value of the personal property only of said deceased, which personal property was on the 21st
9 day of September, A. D. 1900, decreed to be of the value of $1,073,325.74; and that with such last mentioned payment, no act of the Administration proper of the said estate of said deceased

remained unperformed; and in this behalf, these complainants further show, that during all the times herein mentioned, prior to the 10th day of February, A. D. 1902, the condition, income and interests of the estate of said deceased, were such as to warrant and permit, and did in fact warrant and permit, without the sale of any real estate or the sacrifice of any personal property as a means of raising said legacy or said balance thereof, the payment of said final balance of said legacy to said surviving widow by the said 10th day of February, A. D. 1902.

XV.

That under the provisions of said Will as construed by said Supreme Court of the Territory of Hawaii, the aforesaid Abigail K. Campbell Parker is not entitled to the one third of the net income of and from the realty mentioned in Paragraph Ninth of the said Will, and the said Abigail W. Kawananakoa, and the said Alice Macfarlane, respondents herein, are not entitled to any share of the income mentioned in Paragraph Tenth of the aforesaid Will until "after the administration is closed and the estate is distributed to the Trustees."

XVI.

That such bill for construction of some of the provisions of the said Will did not show that "the obligations and bequests contemplated in Paragraphs Numbered Second and Third" of the said Will were fully paid and discharged on the 10th day of February 1902, and no question was submitted to the said Supreme Court as to when the administration closed and the estate of the Testator vested in the said Trustees, complainants herein.

10 XVII.

That doubts have arisen in the minds of the Complainants as to the true construction of Paragraphs Ninth and Tenth of the said Will and particularly whether or not the administration of the said estate closed and the said estate vested in these complainants as such trustees as aforesaid or, for the purpose of determining the rights of the said A. K. Campbell Parker, Abigail Kawananakoa and Alice Macfarlane to such income, the said administration shall be deemed to be closed and the said estate shall be deemed to be vested in these complainants as such trustees as aforesaid, "at and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered Second and Third" of the said Will, that is to say, on the 10th day of February 1902 or on the filing by the complainants of their first and final account as such Executrix and Executors, and of their petition for the allowance of such accounts and for an order to deliver such of the property of the estate as remained in their possession to the persons entitled thereto and discharging them from all further responsibility as such Executrix and Executors as aforesaid, to wit, the 25th day of August 1902, or at any other date prior to the 28th day of July 1905, which date it is necessary to determine for the purpose

of ascertaining the date from which the said A. K. Campbell Parker is entitled to one-third of the income from the said real property and the said Abigail Kawanauakoa and Alice Macfarlane are entitled to a share of the income from the said real and personal property; and that conflicting claims are being made by and on behalf of said respondents in this regard.

11 XVIII.

That the complainants, having taken upon themselves the execution of the said Will, are desirous faithfully to perform their duties in relation thereto, but are advised by counsel that they cannot with safety to themselves and the rights and interests of the respondents proceed in the execution of the said Will and of the trust thereby created without the advice and protection of this Court in giving a construction to the several clauses and provisions of said Will mentioned in paragraph XVII of this their petition and in respect of which have arisen such doubts and uncertainties.

Wherefore, complainants pray:

1. That the process of this Honorable Court do issue citing the respondents and each of them to appear and due answer make to this petition.

2. That an adjudication be made by this Honorable Court as to the several matters in respect to which said doubts and uncertainties have arisen and a decree settling the construction of said Will and directing the complainants in what manner they shall carry the trust thereof into execution, so as to enable them to execute the said trusts properly and with safety to themselves; and

3. For such other further and general relief as complainants may be entitled to in the premises and to this Court may seem meet.

Dated, March 4th, 1907.

(Sgd.) ABIGAIL K. CAMPBELL PARKER.
(Sgd.) J. O. CARTER.
(Sgd.) CECIL BROWN.

(Sgd.) HOLMES & STANLEY,
Attorneys for Complainants.

12 HONOLULU, ISLAND OF OAHU,
Territory of Hawaii, ss:

Cecil Brown being duly sworn upon oath deposes and says that he is one of the complainants named in the foregoing petition; that he has read the same and knows the contents thereof; and that he makes this deposition on behalf of himself and the other complainants named in said Petition and that all the matters and things therein stated and set forth are true.

(Sgd.) CECIL BROWN.

Subscribed and sworn to before me this 4th day of March, 1907.

(Sgd.) F. F. FERNANDES,
Notary Public, First Judicial Circuit,
Territory of Hawaii.

[NOTARIAL SEAL.]

13 "EXHIBIT A."

THIS IS THE LAST WILL AND TESTAMENT of me, JAMES CAMPBELL, of Honolulu in the Hawaiian Islands. Knowing the uncertainty of life, and wishing to make provision for the disposition of my estate, in the event of my death, I do will and direct as follows:

FIRST: My Executrix and Executors, hereinafter named, are directed to reduce to possession all and singular my estate, real personal, and mixed, wheresoever situated; and to manage, control care for and collect the income and revenue thereof, pending the distribution thereof as hereinafter provided; to catalogue, inventory and appraise the same, and to secure an adjudication, by the Court of the Hawaiian Islands having jurisdiction of such matters, of the value thereof. As the interests of my wife, and of my children, concerning such valuation, may conflict, it is my will that each of said interests be fully represented in the proceedings for the determination of the value of my Estate.

SECOND: I direct my said Executrix and Executors to pay and discharge all debts which shall be outstanding against me or my Estate, including all expenses of my last illness and funeral.

THIRD: To my wife,—Abbie Campbell,—I give, devise and bequeath a sum of money equal and equivalent to a One Third (⅓) *por*portion of the sum which, in accordance with paragraph numbered FIRST hereof, shall be finally decreed and determined to be the value of the Personal Property only, belonging and pertaining to my estate, at the date of such decree and determination, and after the payment and discharge, or provision for the pay*ment* and discharge of all obligations contemplated by paragraph numbered SECOND hereof. Such sum shall be paid in cash, and if the condition and interests of my estate shall not warrant the payment of the entire sum hereby contemplated, at one time, then my Ex-

14 ecutrix and Executors shall pay the same as rapidly as the income and interests of my estate shall permit, without the sale of any real estate, or the sacrifice of any personal property, as a means of raising such sum, but PROVIDED that the entire sum shall be paid within Two years from the date of my decease, and no deferred payments shall, within said period of Two years, draw any interest. The said sum to be and become the absolute separate property of my said wife. To have and To Hold unto her, her Executors, administrators and assigns forever.

FOURTH: It is my will that my said wife, and our children, namely, Abbie,—Alice,—Muriel and Mary, together with any other child or children that shall be born to us, shall, during the life of my said wife, have and enjoy the free use and occupation of my residence-houses and grounds at Emma Street, and at Leahi, in said Honolulu; together with all and singular the furniture and fittings therein; the outhouses thereon; and the horses, carriages, harness, stock and utensils therewith used or thereto in any wise appertaining,—as and for a place and places of family residence. Each of my children shall continue to enjoy such right of resi-

dence, with the incidental rights above-described, while he or she shall remain sole and unmarried, and no longer; and this irrespective of whether my said wife be then living or not. And my Executrix and Executors, or the Trustees appointed hereunder, as the case may be, shall maintain said residences, buildings and grounds in suitable condition and repair, at the charge of my Estate, during the life of my said wife, and thereafter while all of my then living children shall be entitled to reside therein. But when any child, by contracting marriage, shall loose such right of residence, then and there-
15 after, (my wife being dead,) the expense of such maintenance and repairs shall be borne by those of my said children who shall be entitled to occupy said premises hereunder.

FIFTH: I direct that my Executrix and Executors do pay to my said wife, for the use of herself and our children, as a family allowance, such sum, monthly, as may from time to time be approved and decreed by the Court having jurisdiction of the Probate of this will. And the Trustees herein provided for, from and after their entry upon their functions of trust hereunder, shall make such further provision for the maintenance of said children as is hereinafter directed.

SIXTH: At and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered respectively SECOND and THIRD hereof, I will and direct that my Executrix and Executors shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate. And I do give, devise and bequeath unto the Trustees hereinafter named, and to those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest, residue and remainder of my Estate, not hereinbefore otherwise given, devised or bequeathed, TO HAVE AND TO HOLD unto said Trustees, their respective heirs, executors, administrators, assigns and successors in trust hereunder, forever. BUT IN TRUST NEVERTHELESS, for the uses and purposes hereinafter expressed and set forth, that is to say:

SEVENTH: With respect to my said residence-houses, and premises, and the personalty therein and thereon, as mentioned in paragraph numbered FOURTH, hereof, to permit and suffer the same to be used and occupied, and to maintain and keep the same in re-
16 pair, as provided in said paragraph FOURTH, and, at the termination of the free use and occupancy thereof, as therein provided and limited, said property, both real and personal, shall be by my said Trustees, (for the time being,) partitioned among my then surviving children, and the lawful issue of my deceased child (*taking by representation*,) in such manner, and upon such terms and conditions as to payment of *soulte* and otherwise, as the parties entitled hereunder shall agree. And in case of their failure to agree, within a reasonable time, it shall be the duty of such Trustees to procure a judicial decree to make such partition; and to carry into effect any partition which shall be agreed upon or decreed hereunder, by suitable deed or deeds of conveyance.

EIGHTH: With respect to all property which shall be so dis-



Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 3

tributed to them, other than that mentioned in the last preceding paragraph, I direct my Trustees aforesaid, to reduce it to possession, and to hold, manage, control, preserve and direct it; and to pay all costs and charges thereof, including their own commissions for such administration. And to collect all the rents, issues, profits, income and revenue thereof, and collect and realize upon all credits and securities, at such times, and in such manner, and upon such terms as to them shall seem best,—and to invest and reinvest, and keep invested,—and at will to change the investments of any and all moneys that shall come to their hands by virtue hereof, and which are not otherwise herein specifically bequeathed, assigned or appropriated; and to segregate, and keep separate and apart, (during the life of my wife,) the accounts of and pertaining to the realty of my Estate from the accounts pertaining to any and all other thereof.

17 NINTH: And from and out of the net income, rents, issues and profits of and from the realty last aforesaid, said Trustees shall pay the equal One Third part or portion thereof, in semi-annual or, (at the discretion of said Trustees,) more frequent payments, to my said wife, for and during the remainder of her natural life. TO HAVE AND TO HOLD the amounts herein provided so to be paid, as and for her absolute and separate property, unto my said wife, her executors, administrators and assigns forever.

TENTH: And the remaining Two Thirds of the net income, rents, issues and profits of and from said realty, during the natural life of my said wife, and, after her death, the entire net sum thereof, shall be by my said Trustees included in one fund with the net income and revenue of and from all my Estate other than such realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than six months, divided into as many equal parts as there shall be then *in esse* any of my children by my said wife, and shall be by said Trustees paid to my said children, from and after their respective majority or marriage, share and share alike: PROVIDED, that if any of my said children shall decease, leaving lawful issue, such issue shall stand in the place or places of his, her, or their parent or parents in all respects concerning the division, payment and receipt of the fund herein mentioned; and FURTHER PROVIDED that during the minority of said children respectively, and while they shall respectively remain unmarried, within such minority, said Trustee shall provide him her or them being so minor and unmarried, with suitable maintenance and education, and funds for foreign travel, in so far as the same shall be suitable and desirable to their

18 means and condition; and all sums expended under this provision shall be charged to Family Maintenance, and none of it shall be charged to said children, or any of them individually. And my surplus revenues arising or remaining under the provisions of this paragraph, shall become a part of the principal of my Estate and shall be invested and reinvested as such. The sums expended for family maintenance hereunder shall not be reckoned as a part of such net income as herein provided.

ELEVENTH: And it is further my will that no beneficiary devisee or legatee under this Will shall have the power or authority to in any wise anticipate any of the rents, issues, profits, income, moneys or payments herein provided to be devoted or paid to him or her, or any part thereof; nor to alienate, convey, transfer or dispose of the same, or of any interest therein or part thereof, in advance of payment, nor shall the same be involuntarily alienated by him or her, or be subject to attachment or execution, or to be levied upon or taken upon any process for any debts which any such beneficiary, devisee or legatee shall have contracted or shall contract; or in satisfaction of any demands or obligations which he or she shall incur. And all payments in the last preceding paragraph authorized and provided for, shall be made, and shall be valid and effectual only when made to the beneficiary, devisee or legatee, in person, to whom the same shall appertain and belong, and upon his or her individual receipt: PROVIDED that when and while the person so entitled to receive such payment shall be without the bounds of the Hawaiian Islands, such payment may be made to any formally appointed agent of such absentee, but then only upon the personal receipt above provided for. AND FURTHER PROVIDED that if, and while any
19 such beneficiary, devisee or legatee shall be for any reason other than minority, subject to judicial guardianship, such payments shall be made to the guardian or guardians of the persons so subject.

TWELFTH: It being my purpose herein to provide a safe and certain income and maintenance for my wife, our children and grandchildren, for and during the period of the trusts hereby established, I do will and direct that each female beneficiary hereunder shall receive and hold all moneys and other rights and privileges herein provided for, free from the debts and control of any husband she may have after the date of the execution of this will, and that the Trustees herein named, and their successors in trust hereunder, shall keep intact my Estate, and administer the same under the name of "The Estate of James Campbell," and that the realty thereof, (except as herein provided in the case of said residence premises) shall be particularly and especially preserved intact, and shall be alienated only in the event, and to the extent, that the obvious interests of my Estate shall so demand.

THIRTEENTH: The authority of my said Trustees hereunder, shall continue during the natural life and lives of my said wife, and of my children by my said wife, who shall be *in esse* at the date of my decease, and the survivor of them; and, if there shall be *in esse*, at the death of such survivor, any lawful issue of any such child as last aforesaid, then these trusts, and the authority of said Trustees thereunder, shall further continue for *for* the definite term of Twenty Years after the decease of such survivor, PROVIDED any such lawful issue as aforesaid shall live so long, and if not, then for such lesser term and period as he, she or they shall live.

20 FOURTEENTH: At the end of the period limited in the last preceding paragraph, said Trustees shall partition, or have judicially partitioned all and singular my Estate among and between

such lawful issue of my said children as shall then be *in esse*, (each of such issue taking *per stirpes*, and not *per capita*,) and shall carry such partition into effect by adequate instruments of absolute conveyance.

FIFTEENTH: If, at the death of the survivor of my said wife and children, there shall be living no lawful issue of any of said children, then, and in that event, I direct my Trustees, by adequate instruments of absolute conveyance, to convey all and singular my Estate to my right heirs, as soon as their identity shall be finally established, and in the proportions to which Hawaiian law shall entitle them respectively.

SIXTEENTH: The provision herein made for my wife is intended and shall be by her accepted, (if at all,) in lieu and full satisfaction of her dower interest in my Estate. The word "issue" as used herein, is intended to mean, and signifies, all persons lawfully descended from any of my said children as a common ancestor.

SEVENTEENTH: I direct that my Trustees shall furnish to each beneficiary, devisee and legatee hereunder, during the month of January in each year, a complete and detailed account and statement of the receipts, expenditures, transactions, assets and liabilities of my said Estate, for the preceding year, which shall be known as their Annual Report. A copy of such Report shall be filed with the Hawaiian Court having probate jurisdiction, and such account shall be subject to approval, modification or surcharge by such Court, upon legal notice to all concerned.

21 EIGHTEENTH: I hereby nominate and appoint my said wife, Abbie Campbell, as Executrix, and Joseph O. Carter, the elder, and Cecil Brown, both of said Honolulu, as Executors of this my last Will and Testament; and I further nominate and appoint my said wife, and said Joseph O. Carter, the elder and Cecil Brown, to be and act as Trustees of my said Estate, as hereinbefore provided. And I will and direct that if, for any reason, one or more of said persons so nominated shall be unable or shall decline to assume or continue the relation of such Executrix, Executor or Trustee, his or her place as such officer shall be filled as follows; namely: If only one of said nominees shall be willing to so act, or if, for any reason, their number, as such officers, shall be reduced to one, the one so willing to act or acting, shall nominate to the Hawaiian Court having probate jurisdiction, some other suitable person to act as such Executrix, Executor or Trustee, as the case may be. If such nomination shall be confirmed by the Court, and such nominee shall duly qualify, then the remaining vacancy shall be filled by a joint nomination of the two persons so qualified, and confirmation by the Court. And where there shall exist but one such vacancy, both of the persons then willing to act or acting, shall join in any nomination to fill the same; and, in like manner any and all successive vacancies shall be filled, by such nominations and confirmations.

NINETEENTH: I will and direct that bonds shall be required of all persons who shall be appointed and confirmed as Executrices, Executors or Trustees hereunder, but only in such sum as shall equal the prospective annual income of my said Estate for the year next succeeding the date of fixing the amount of such bonds.

22 TWENTIETH: The concurrence of any two of my Executrix, Executors and Trustees, appointed in compliance with the provisions of this Will, shall suffice for any act herein authorized, If one Executrix, Executor or Trustee shall dissent from the others in regard to any considerable transaction, or respecting the general course pursued by the majority, it shall be the duty of such dissentient to state the reasons for his or her dissent in the final Report of the Executrix and Executors, or in the next Annual Report of the Trustees, as the case may be.

TWENTY FIRST: Any and all Wills and Testaments by me at any time or times heretofore made or executed, is and are hereby revoked, annulled and cancelled.

TWENTY SECOND: I will and direct that no person who shall in good faith pay money to my Executrix, Executors or Trustees hereunder, in discharge or on account of any valid obligation to my Estate, nor any purchaser from said Executrix, Executors or Trustees, of any real or personal property of my Estate, in manner authorized by this Will, shall be in anywise responsible for the application or misapplication by said Executrix, Executors or Trustees of the money so paid, or of the proceeds of the purchase or sale of such property.

IN TESTIMONY WHEREOF, I have inscribed my name in the margin of each of the ten (10) pages of this my Last Will and Testament preceding this page, which said pages are typewritten, and each consisting of twenty nine numbered lines,—and I have also subscribed my name to the whole, on this present page, being page number eleven (11) hereof, and have published and declared, and do hereby publish and declare This Instrument as and for my Last Will and Testament, at the City and County of San
23 Francisco, in the State of California, this Eighth day of July, in the year of our Lord, One Thousand, Eight Hundred and Ninety Six.

(S.) JAMES CAMPBELL.

On this Eighth day of July, in the year One Thousand, Eight Hundred and Ninety Six, at the City and County of San Francisco, in the State of California, in the presence of the undersigned, and each of us, the above named James Campbell, of Honolulu, Hawaiian Islands, (he being well known to each of us,) did inscribe his name in the margin of each of the ten (10) pages of this Instrument which precede this present page; and did, in our and each of our presence, subscribe his name to said instrument, on this present page; and did, in the presence and hearing of us, and each of us, publish and declare the said Instrument as and for his Last Will and Testament. Wherefore we, at the City and County aforesaid, and upon the date last aforesaid, at the request of said James Campbell, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses of the inscription, subscription, publication, declaration and request aforesaid.

(S.) F. WUNDENBERG.
(S.) CHAS. T. WILDER.
(S.) CLARENCE W. ASHFORD.

24 EXHIBIT B.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased,

v.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor, and —— KAWANANAKOA, a Minor.

Appeal from Circuit Judge, First Circuit.

Submitted October 1, 1906; Decided October 29, 1906.

Frear, C. J., Hartwell and Wilder, JJ.

Wills—construction:

A legacy to a widow of one-third of the personalty to be "paid in cash, and of the condition and interests of my estate shall not warrant the payment of the entire sum hereby contemplated at one time, then my executrix and executors shall pay the same as rapidly as the income and interests of my estate shall permit, without the sale of any real estate or the sacrifice of any personal property, as a means of raising such sum, but provided that the entire sum shall be paid within two years," was properly paid from cash on hand and income from all sources.

Expenses for maintaining and repairing residences under a direction in the will to "maintain said residences, buildings and grounds in suitable condition and repair at the charge of my estate," were properly paid out of the general income of the estate.

25 Under a direction in the will to "pay to my said wife for the use of herself and our children as a family allowance such sum monthly as may from time to time be approved and decreed by the court having jurisdiction of the probate of this will," it was proper to charge such family allowance against the gross income of the estate. Under the will such allowance ceased upon the discharge of the executors. An extra sum expended by the widow for traveling expenses of two of her children, which was approved by the circuit judge sitting in probate, is held in this case to constitute a proper charge against the estate.

Sums expended by the executors in connection with the realty, such as commissions on income from realty, insurance, taxes, water rates, alterations to buildings other than homesteads, etc., were properly paid out of the gross income of the estate where the only direction in the will is that the executrix and executors are to take possession of and manage the estate and collect the income therefrom pending distribution.

Under the provisions of the will the widow's one-third of the net income from realty should be paid before family maintenance for minor unmarried children is deducted.

A provision in the will that income be paid by the trustees to the widow and children does not entitle the widow and children to income beginning with the death of the testator but only from and after the discharge of the executors.

Under a provision that net income be "divided into as many equal parts as there shall be then *in esse* any of my said children by my said wife shall be by said trustees paid to my said children
26 from and after their respective majority or marriage share and share alike," a minor unmarried child takes a contingent interest.

Opinion of the Court by Wilder, J.

This is a bill in equity brought by the trustees under the will of James Campbell to construe certain portions of said will. From the decree of the circuit judge all of the defendants appealed. The will was admitted to probate on June 26, 1900, and on July 3, 1905, the plaintiffs, as executrix and executors, were discharged and ordered to distribute to themselves as trustees the balance of the property. Testator left a widow and four daughters surviving. At the time this suit was brought two of the daughters were of age and had married, one of them having three children. At the testator's death there was over $200,000 cash on hand and an annual income from all sources of over $100,000.

The portions of the will material to be considered are as follows:

"First. My executrix and executors, hereinafter named, are directed to reduce to possession all and singular my estate, real, personal, and mixed, wheresoever situated; and to manage, control, care for and collect the income and revenue thereof, pending the distribution thereof as hereinafter provided; to catalogue, inventory and appraise the same, and to secure an adjudication, by the court of the Hawaiian Islands having jurisdiction of such matters, of the value thereof. As the interests of my wife, and of my children, concerning such valuation, may conflict, it is my will that each of said interests be fully represented in the proceedings for the determination of the value of my estate.

"Second. I direct my said executrix and executors to pay and discharge all debts which shall be outstanding against me or my estate, including all expenses of my last illness and funeral.

"Third. To my wife, Abbie Campbell, I give, devise and bequeath a sum of money equal and equivalent to a one-third (⅓) proportion of the sum which, in accordance with paragraph numbered first hereof, shall be finally decreed and determined to be the value of the personal property only, belonging and pertaining to my estate, at the date of such decree and determination, and after the payment and discharge, or provision for the payment and discharge of all obligations contemplated by paragraph numbered second hereof. Such sum shall be paid in cash, and if the condition and interests of my estate shall not warrant the payment of the entire sum hereby contemplated, at one time, then my executrix
27 and executors shall pay the same as rapidly as the income and interests of my estate shall permit, without the sale of

any real estate, or the sacrifice of any personal property, as a means of raising such sum, but provided that the entire sum shall be paid within two years from the date of my decease, and no deferred payments shall, within said period of two years, draw any interest. The said sum to be and become the absolute separate property of my said wife. To have and to hold unto her, her executors, administrators and assigns forever.

"Fourth. It is my will that my said wife, and our children, namely, Abbie, Alice, Muriel and Mary, together with any other child or children that shall be born to us, shall, during the life of my said wife, have and enjoy the free use and occupation of my residence-houses and grounds at Emma Street, and at Leahi, in said Honolulu; together with all and singular the furniture and fittings therein; the outhouses thereon; and the horses, carriages, harness, stock and utensils therewith used or thereto in any wise appertaining,—as and for a place and places of family residence. Each of my children shall continue to enjoy such right of residence, with the incidental rights above described, while he or she shall remain sole and unmarried, and no longer; and this irrespective of whether my said wife be then living or not. And my executrix and executors, or the trustees appointed hereunder, as the case may be, shall maintain said residences, buildings and grounds in suitable condition and repair, at the charge of my estate, during the life of my said wife, and thereafter while all of my then living children shall be entitled to reside therein. But when any child, by contracting marriage, shall lose such right of residence, then and thereafter (my wife being dead,) the expense of such maintenance and repairs shall be borne by those of my said children who shall be entitled to occupy said premises hereunder.

"Fifth. I direct that my executrix and executors do pay to my said wife, for the use of herself and our children, as a family allowance, such sum, monthly, as may from time to time be approved and decreed by the court having jurisdiction of the probate of this will. And the trustees herein provided for, from and after their entry upon their functions of trust hereunder, shall make such further provision for the maintenance of said children as is hereinafter directed.

"Sixth. At and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered respectively second and third hereof, I will and direct that my executrix and executors shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate. And I do give, devise and bequeath unto the trustees hereinafter named, and to those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest, residue and remainder of my estate, not hereinbefore otherwise given, devised or bequeathed. TO HAVE AND TO HOLD unto said trustees, their respective heirs, executors, administrators, assigns and successors in trust hereunder, forever. BUT IN TRUST NEVERTHELESS, for the uses and purposes hereinafter expressed and set forth, that is to say:

"Seventh. With respect to my said residence-houses, and premises, and the personalty therein and thereon, as mentioned in paragraph numbered fourth, hereof, to permit and suffer the same to be used and occupied, and to maintain and keep the same in repair, as provided in said paragraph fourth, and, at the termination of the free use and occupancy thereof, as therein provided and limited, said property, both real and personal, shall be by my said trustees, (for the time being) partitioned among my then surviving children and the lawful issue of any deceased child (taking by representation) in such manner, and upon such terms and conditions as to payment of owelty and otherwise, as the parties, entitled hereunder shall agree. And in case of their failure to agree, within a rea-
28 sonable time, it shall be the duty of such trustees to procure a judicial decree to make such partition; and to carry into effect any partition which shall be agreed upon or decreed hereunder, by suitable deed or deeds of conveyance.

"Eighth. With respect to all property which shall be so distributed to them, other than that mentioned in the last preceding paragraph, I direct my trustees aforesaid, to reduce it to possession and to hold, manage, control, preserve and direct it; and to pay all costs and charges thereof, including their own commissions for such administration. And to collect all the rents, issues, profits, income and revenue thereof, and collect and realize upon all credits and securities, at such times, and in such manner, and upon such terms as to them shall seem best,—and to invest and reinvest, and keep invested,—and at will to change the investments of any and all moneys that shall come to their hands by virtue hereof, and which are not otherwise herein specifically bequeathed, assigned or appropriated; and to segregate, and to keep separate and apart (during the life of my wife,) the accounts of and pertaining to the realty of my estate from the accounts pertaining to any and all other thereof.

"Ninth. And from and out of the net income, rents, issues and profits of and from the realty last aforesaid, said trustees shall pay the equal One Third part or portion thereof, in semi-annual or, (at the discretion of said trustees,) more frequent payments, to my said wife, for and during the remainder of her natural life. To HAVE AND TO HOLD the amounts herein provided so to be paid, as and for her absolute and separate property,—unto my said wife, her executors, administrators and assigns forever.

"Tenth. And the remaining Two Thirds of the net income, rents, issues and profits of and from said realty, during the natural life of my said wife, and, after her death, the entire net sum thereof, shall be by my said trustees included in one fund with the net income and revenue of and from all my estate other than such realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than SIX months, divided into as many equal parts as there shall be then *in esse* any of my children by my said wife, and shall be by said trustees paid to my said children, from and after their respective majority or marriage, share and share alike; PROVIDED, that if any of my said children shall decease, leaving lawful issue, such issue shall stand in the place

or places of his, her, or their parent or parents in all respects concerning the division, payment and receipt of the fund herein mentioned; and FURTHER PROVIDED that during the minority of said children respectively, and while they shall respectively remain unmarried, within such minority, said trustees shall provide him her or them being so minor and unmarried, with suitable maintenance and education, and funds for foreign travel, in so far as the same shall be suitable and desirable to their means and condition; and all sums expended under this provision shall be charged to Family Maintenance, and none of it shall be charged to said children, or any of them, individually. And any surplus revenues arising or remaining under the provisions of this paragraph, shall become a part of the principal of my estate, and shall be invested and reinvested as such. The sums expended for family maintenance hereunder shall not be reckoned as a part of such net income as herein provided.

"Twelfth. It being my purpose herein to provide a safe and certain income and maintenance for my wife, our children and grandchildren, for and during the period of the trusts hereby established, I do will and direct that each female beneficiary hereunder shall receive and hold all moneys and other rights and privileges herein provided for, free from the debts and control of any husband
29 she may have after the date of the execution of this will,— and that the trustees herein named, and their successors in trust hereunder shall keep intact my estate, and administer the same under the name of 'The Estate of James Campbell,'—and that the realty thereof, (except as herein provided in the case of said residence premises) shall be particularly and especially preserved intact, and shall be aliened only in the event, and to the extent, that the obvious interests of my estate shall so demand.

"Sixteenth. The provision herein made for my wife is intended, and shall be by her accepted, (if at all,) in lieu and full satisfaction of her dower interest in my estate. The word 'issue' as used herein, is intended to mean, and signifies, all persons lawfully descended from any of my said children as a common ancestor."

In the main, the will as a whole is clear and free from any serious difficulty as to its meaning. There is a marked distinction between the duties of the executors and of the trustees, which distinction is of importance in considering the matters involved. The desire to conserve the estate and provide at all times sufficient funds for the maintenance of the widow and children is clearly indicated all through the will. With these few observations we will now proceed to discuss the questions involved.

1. Is the legacy to the widow payable (*a*) out of the cash on hand at the death of testator and proceeds of personalty subsequently converted by the executrix and executors, or (*b*) out of the cash on hand at the death of testator and proceeds of personalty subsequently converted as well as the net income from the realty and personalty of the estate or either of them?

The legacy was paid from cash on hand and income from all sources, which course was approved by the circuit judge. We have no doubt that the executrix and executors acted in accordance with

the intention of the testator as expressed in the will. The will provided that the legacy should be paid in cash, and "if the condition and interests of my estate shall not warrant the payment of the entire sum hereby contemplated at one time then my executrix and executors shall pay the same as rapidly as the income and interests of my estate shall permit without the sale of any real estate or the sacrifice of any personal property as a means of raising such sum provided that the entire sum shall be paid within two years." The fact
30 that payment was to be made without the sale of any real estate or sacrifice of personal property and two years were allowed within which to make it as the income and interests of the estate (which means the estate as a whole) warranted, shows very clearly the intention of the testator. Before the distribution of the estate to the trustees no distinction whatever is made by the testator as to income whether from personalty, from realty or from any other source. The testator evidently believed that with the cash that would be left at his death, together with the large income of the estate, this payment could be made in two years' time without the disposal of any of the property. This belief was justified as shown by the facts after the testator's death. The ruling of the circuit judge on this point should be affirmed.

2. Should the sum of $16,000 paid by the executrix and executors for maintaining and repairing the Emma street and Waikiki residences be charged against the principal of the personalty of the estate or the income thereof or against the realty or income thereof?

It was held by the circuit judge that this sum should be charged against the gross income from realty. The will provides that the residences shall be maintained in suitable condition and repair at the charge "of my estate" for the use of those entitled to occupy the same. During the administration period, as already pointed out, the will makes no distinction between income from realty and income from personalty, and in the absence of any particular direction to the contrary it would seem that this expense should be paid out of the general income of the estate. Moreover, as the testator has directed that such expense should be at the charge of his whole estate, that settles the matter. The ruling of the circuit judge on this question should be reversed.

3. Should the sum of $93,000 expended by the executrix and executors for family allowance and approved by the circuit judge sitting in probate be charged to principal or income or personal-
31 alty or to income from realty or out of all three of any two of such funds, and did such family allowance cease upon the discharge of the executrix and executors?

The circuit judge held that this sum was chargeable against the income from all sources, that is from both personalty and realty, and that such allowance should cease upon the discharge of the executrix and executors. The direction of the will is to pay to the widow for the use of herself and children as a family allowance such sum as may be approved by the probate court. This sum has been so approved, and it is only a question of whether it should be charged to any particular fund. As no specific fund was named it was prop-

erly paid out of the income from all sources. It is also clear that this family allowance, so far as the executrix and executors are concerned, ceased upon their discharge, as the will directs that the trustees shall make further provision for the maintenance of the children, and obviously the executrix and executors could not make payments under the will after they had been discharged as such. The ruling of the circuit judge on this point is affirmed.

4. Should the sum of $85,000 expended by the executrix and executors for expenses in connection with the realty, such as executors' commissions on income from realty, insurance, taxes, water rates, alterations to buildings other than homesteads, etc., be charged against principal of personalty or against income thereof or against the income of the realty?

The holding of the circuit judge that this should be charged against the income from the realty was probably based on the fact that the trustees were directed to keep separate accounts of income from realty and income from personalty. But, as already pointed out, until the discharge of the executrix and executors no distinction is made in the income whether derived from realty or from personalty. The will provides that the executrix and executor
32 are to take possession of and manage the estate and collect the income therefrom pending distribution. Like any other expense of administration, in the absence of direction in the will to the contrary, it should be paid out of the gross income from all sources. The decree on this point should be reversed.

5. Should the sum of $3745.95 expended by the widow prior to the discharge of the executrix and executors (over and above the family allowance of $1500 monthly) for the traveling expenses of two of her children constitute a proper charge against the estate?

This amount was allowed and approved on the final settlement of the accounts and constituted an allowance for the family in addition to the $1500 monthly. We see no reason in this suit for setting aside such allowance and approval. The decree on this point is affirmed.

6. Are the sums directed by the will to be paid by the trustees for maintenance of the children chargeable against the balance of the income of the estate before or after deducting the widow's one-third part of the net income of the realty.

Paragraph 8 of the will directs the accounts pertaining to the realty of the estate to be kept separate and apart from the accounts pertaining to the balance. Paragraph 9 directs payment to the widow of one-third of the net income from the realty. Paragraph 10, after providing as to the balance of the income from realty together with the income from all other sources, directs the trustees in a proviso to provide the minor and unmarried children with suitable maintenance and then says, "and all sums expended under this provision shall be charged to family maintenance, and none of it shall be charged to said children, or any of them, individually. * * * The sums expended for family maintenance hereunder shall not be reckoned as a part of such net income as herein provided." The question is whether or not this family maintenance

is charged against any particular part of the income, that is, whether
in the last sentence of paragraph 10 of the will the words
33 "such net income as herein provided" mean the net income
referred to in paragraph 10. In the first place there is an absolute direction to keep separate and apart the accounts pertaining to the realty. Then there is a provision with no limitation or qualification to pay one-third of the net income from realty to the widow for life. And then comes a provision relating to the disposition of the balance of the income from realty together with the income from all other sources, namely, that it shall be divided into as many equal parts as there shall then be children *in esse* and paid to said children from and after their respective majority or marriage. This last provision is qualified and limited by the direction to provide family maintenance for the minor unmarried children. The provision for family maintenance being a limitation on the general direction to divide a certain part of the income for the children cannot be held to qualify the previous absolute direction to pay the widow one-third of the net income from the realty, particularly in view of the further provision that the trustees shall keep separate the accounts as to realty and personalty, which separation of the accounts by the trustees begins on the discharge of the executors. Therefore, the widow is to be paid her share of the net income of the realty before any family maintenance is deducted. The decree should be reversed on this point.

7. Are the widow and children entitled to any share of the net income provided for in the ninth and tenth clauses of the will pending the closing of administration?

We have no hesitation in answering this question in the negative. It is only after the administration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income and it is only from that time that the accounts are to be kept separate and the income apportioned.

8. Are the shares of the unmarried minor children vested or contingent?

The will in paragraph ten directs that two-thirds of the
31 net income from the realty, together with all the net income
from the personalty, shall be included in one fund, which fund shall at least once every six months be "divided into as many equal parts as there shall be then *in esse* any of my children by my said wife and shall be by said trustees paid to my said children from and after their respective majority or marriage share and share alike. * * * And any surplus revenues arising or remaining under the provisions of this paragraph shall become a part of the principal of my estate, and shall be invested and reinvested as such." In our opinion these interests are contingent. The vesting is postponed until majority or marriage. This is consistent with a general view of the whole will. In case of the death of any minor unmarried child such portion of the accumulated income that would otherwise go to such child on majority or marriage then becomes surplus revenue referred to by the testator and is to be added to the principal of the estate. The sentence as to surplus revenues

would be useless and unnecessary if the interests of the minor unmarried children were vested.

The decree appealed from is affirmed except as to questions 2, 4 and 6 and as to those questions it is reversed.

HOLMES & STANLEY,
for Plaintiffs.
A. G. M. ROBERTSON,
J. J. DUNNE,
R. W. BRECKONS,
E. C. PETERS AND
E. M. WATSON
for Defendants.

Endorsed: Equity No. 1561. Reg. 1:301. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell Parker, *et al.* Complainants, *v.* Abigail K. Campbell Parker, *et al.* Respondents. Bill of Complaint. Filed March 6, 1907, at 9:40 o'clock A. M. J. A. Thompson, Clerk. Holmes & Stanley, Kaahumanu St. Attorneys for Complainants.

35 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANKOA, a Minor, and ALICE K. MACFARLANE, a Minor, Respondents.

Order Appointing Guardians Ad Litem.

On reading the Bill of Complaint on file herein, it appearing that guardians ad litem should be appointed for the minors therein named, it is hereby ordered that E. C. Peters, Esq., be and he is hereby appointed guardian ad litem of and for Muriel K. Campbell and Beatrice U. (Mary) Campbell, minors; that E. M. Watson, Esq., be and he is hereby appointed guardian ad litem of and for Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa and Lydia Liliuokalani Kawananakoa, minors; and that S. H. Derby, Esq., be and he is hereby appointed W. J. R. guardian *ad litem* of and for Alice K. Macfarlane, minor, all of said minors being impleaded herein as parties respondents.

Dated, Honolulu, March 15, 1907.

W. J. ROBINSON,
Third Judge Circuit Court First Circuit.

Endorsed: Equity 15 41. R. 1 301. Circuit Court First Circuit. T. H. At Chambers. In Equity. A. K. C. Parker *et al.* v. A. K. C. Parker *et al.* Order appointing Guardians *ad litem*. Filed March 15th, 1907 at 9.50 o'clock A. M. L. P. Scott, Clerk.

36 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE C. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Demurrer of Alice E. K. Macfarlane.

Now comes the respondent, Alice E. K. Macfarlane, by her Guardian *ad litem* S. H. Derby and, not admitting all or any of the allegations of the Bill of Complaint on file herein to be true, demurs to said Bill of Complaint and for causes of demurrer shows.

1.

That it appears in and from the allegations in said Bill of Complaint that the matters on which the Complainants seek instructions are *Res Adjudicata*.

2. That it appears in and from the allegations in said Bill of Complaint that none of the Respondents herein are entitled to any share in the income from the Etate of James Campbell, deceased, save from and after the 28th day of July A. D. 1905, that said income only began to accrue on said date and that the admini-
37 istration of said estate was not closed, nor was the same distributed to the Trustees until said date, and that no property vested in said Trustees until said date, and that hence no doubt or uncertainty can exist as to the true construction of the Will of James Campbell, deceased, in regard to those matters as to which relief is prayed.

3. That this Honorable Court, sitting as a Court of Equity, has no power, in the absence of fraud or mistake, to modify or amend the Decree of July 3rd A. D. 1905 discharging the executrix and executors mentioned in said Bill and directing them to distribute the estate to the Trustees therein named, that therefore the administration cannot be deemed to have closed nor the estate to have vested in the Trustees before that time, and that hence no legal doubt can exist as to when said events shall be deemed to have taken place and no cause of suit is stated in and by said Bill of Complaint.

Wherefore this Respondent prays that said Bill of Complaint may be dismissed, and that she be not required to make further answer thereto.

Dated, March 27th, 1907.

ALICE E. K. MACFARLANE,
(Sgd.) By S. H. DERBY,
Her Guardian ad Litem.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law, and that it is not interposed for purposes of delay.

(Sgd.) S. H. DERBY,
Guardian ad Litem of Alice E. K. Macfarlane.

(Endorsed:) Reg. 1 301. Equity No. 1561. At Chambers. In Equity. First Judicial Circuit Territory of Hawaii. Abigail K. Campbell Parker *et al.* Plaintiffs, *vs.* Abigail K. Campbell Parker *et al.* Defendants. Demurrer of Alice E. K. Macfarlane ——— ———. Judge. Filed Mar. 27, 1907, at 8:50 A. M. John Marcallino, Clerk. Kinney, McClanahan & Derby 303-305 Judd Bldg. Honolulu. Attorneys for ——— ——— (Office No. —.)

38 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees Under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE L. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Demurrer of Kawananakoa Minors.

Come Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa, and Lydia Liliuokalani Kawananakoa, minors, three of the respondents above named, by E. M. Watson, their guardian *ad litem*, and, not confessing all or any of the matters and things in complainants' bill of complaint contained to be true, demur to said bill, and for causes of demurrer show:

1. That said bill of complaint does not contain any matter of equity whereon this Court can ground any decree, or give to the complainants the relief prayed for therein, or any relief, in that it affirmatively appears from said bill that the administration of the estate of James Campbell, deceased, actually closed and said estate was distributed to the Trustees on the 28th day of July, 1905.

2. That it appears from the allegations in said bill of *of*
39 complaint contained that the matters and things sought thereby to be submitted to this Court for its present consideration and determination are *res adjudicata*.

3. That this Court is without jurisdiction to grant the relief prayed for in said bill of complaint or any relief.

4. That this Court of Equity, in the absence of a showing of fraud, mistake or accident, is without jurisdiction to alter, amend, or in anywise interfere with the force and effect of that certain decree of distribution heretofore, to-wit, on the 3rd day of July, 1905, made and entered by the Second Judge of this Court, sitting at Chambers in Probate, in that certain proceedings then properly before him entitled "In the matter of the Estate of James Campbell, deceased," for the purpose of fixing the rights of certain of the parties hereto to share in the income of said estate, or for any other purpose.

Wherefore, these respondents demand the judgment of this Court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained; and pray to be hence dismissed with their reasonable costs in this behalf sustained.

Dated, Honolulu, March 27, 1907.

ABIGAIL HELEN KAPIOLANI KAWANANAKOA,
DAVID KALAKAUA KAWANANAKOA,
LYDIA LILIUOKALANI KAWANANAKOA.

(Sgd.) By E. M. WATSON,
Their Guardian ad Litem.

I hereby certify that the above and foregoing demurrer is not intended for delay.

(Sgd.) E. M. WATSON,
Att'y & Gdn. ad Litem Kawananakoa Minors.

(Endorsed:) Eq. 1561. Reg. 1:301. Circuit Court First Circuit. At Chambers. In Equity. Abigail K. Campbell Parker *et al.*, Trustees *vs.* Abigail K. Campbell Parker *et al.* Demurrer of Kawananakoa Minors. Filed at 12:10 P. M., March 27, 1907. Henry Smith, Clerk. E. M. Watson, Guardian *ad litem* for Kawananakoa Minors.

40 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees Under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Decree.

The demurrers of the Respondents Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, Lydia Liliuokalani Kawananakoa, a minor, and Alice E. K. Macfarlane, a minor, to the Bill of Complaint of the plaintiffs herein having come duly on to be heard on the 10th day of April, A. D. 1907, and argument having been had on said demurrers and the matter having been duly submitted to the court, and the court by an oral decision made on the 17th day of April, 1907, having sustained said demurrers and dismissed said Bill of Complaint without leave to amend and with costs:

Now therefore it is hereby ordered and decreed that said demurrers be and the same hereby are sustained and that the Bill of Complaint of the plaintiffs herein be and the same hereby is dismissed
41 without leave to amend and with costs.

Dated, Honolulu, April 20, 1907.

(Signed) W. J. ROBINSON,
Third Judge of the Circuit Court of the First Judicial Circuit.

(Endorsed:) Equity No. 1561. Reg. 1/301. At Chambers. In Equity. First Judicial Circuit Territory of Hawaii. Abigail K. Campbell Parker *et al.*, Plaintiffs, *vs.* Abigail K. Campbell Parker *et al.*, Defendants. Decree. Robinson, Judge. Filed April 20, 1907, at 11 A. M. M. T. Simonton, Clerk. Kinney, McClanahan & Cooper, 303-305, Judd Bldg. Honolulu. Attorneys for ——. (Office No. —.)

42 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees Under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; BEATRICE C. (MARY) CAMPBELL, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Notice of Appeal and Appeal.

Come now Abigail K. Campbell Parker, Joseph O. Carter, and Cecil Brown, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, deceased, the complainants in the above entitled cause, by their attorneys, Holmes & Stanley, and give notice of appeal, and do hereby appeal, to the Supreme Court of the Territory of Hawaii from the decree rendered by the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in said cause and filed therein on the 20th day of April, 1907, sustaining the demurrers of Abigail Helen Kapiolani Kawananakoa, David Kalakaua Kawananakoa and Lydia Liliuokalani Kawananakoa, minors, by E. M. Watson, their Guardian *ad litem*, and Alice E. K. Macfarlane, a
43 minor, by S. H. Derby, her Guardian *ad litem*, to said complainants' bill of complaint in said cause, and dismissing said bill of complaint.

Dated Honolulu, T. H., April 20, 1907.

ABIGAIL K. CAMPBELL PARKER,
JOSEPH O. CARTER,
CECIL BROWN,
Executrix and Executors and Trustees Under the Will and of the Estate of James Campbell, Deceased,
By Their Attorneys, HOLMES & STANLEY.

(Endorsed:) E. 1561. Reg. 1 301. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Abigail K. Campbell Parker, *et al.*, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, deceased, Complainants, *v.* Abigail K. Campbell Parker, *et al.*, Respondents. Notice of Appeal and Appeal. Dated April 20, 1907. Filed April 20, 1907, at 11:59 o'clock A. M. J. A. Thompson, Clerk. Holmes & Stanley, Attorneys for Complainants. Kaahumanu Str. Honolulu, T. H.

44 *Request for a Substitute Justice.*

(Section 1170, Civil Laws.)

In the Supreme Court of the Territory of Hawaii, October Term, 1906.

ABIGAIL K. C. PARKER, Trustee of and under the Will of James Campbell, Deceased,

v.

ABIGAIL K. C. PARKER ET AL.

To Hon. J. T. De Bolt:

Mr. Justice Alfred S. Hartwell,* being unable through absence from the Territory to sit with us in the above entitled cause, we, the remaining Justices of the Supreme Court, hereby request and authorize you to sit with us and hear and determine the said cause.

Dated the 1st day of June, 1907.

W. F. FREAR.
A. A. WILDER

Attest:
J. A. THOMPSON, *Clerk.*

---

* Unable through illness, etc., or disqualified.

(Endorsed:) Supreme Court Territory of Hawaii. Abigail K. C. Parker, Trustees of and under the Will of James Campbell, deceased, *v.* Abigail K. C. Parker *et al.* Request for a Substitute Justice. Filed June 1, 1907. J. A. Thompson, Clerk.

45 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased,

v.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, Minor.

Appeal from Circuit Judge, First Circuit

Argued June 1, 4, 1907; Decided June 14, 1907.

Frear, C. J., Wilder, J., and Circuit Judge De Bolt in Place of Hartwell, J.

Res adjudicata:

A decision in a former suit that the widow and children of a testator not entitled under his will to income until after the close of

administration and the distribution of the property to certain trustees is *res adjudicata* in a subsequent suit between the same parties to ascertain the date when the administration closed and the property was distributed, it appearing that the question in each suit concerned the disposition of certain income which accrued from the property up to the time of the order of distribution.

46 Wills—construction;

Where the income of a testator's residuary estate is given to the widow and children for life and the will prescribes the date of the order of distribution as the time from which such income should be paid, (which date in this case was July 3, 1905,) the widow and children are only entitled to income which accrues from and after that date.

Opinion of the Court by Wilder, J.

This is an appeal by plaintiffs as trustees from a decree sustaining demurrers to a bill in equity for advice in connection with the will of James Campbell. It appears from the bill that James Campbell died on April 21, 1900, leaving a widow and four daughters, two of which daughters have since reached majority and married and had children; that his will, a copy of which is attached to the bill, was admitted to probate on June 26, 1900, and letters testamentary were issued to plaintiffs as executrix and executors thereunder; that by February 10, 1902, the executrix and executors had paid all legacies, debts and expenses; that on August 25, 1902, the executrix and executors filed their final accounts and petitioned for an order of distribution and discharge which, as amended and supplemented for various causes alleged, were not approved and granted Until July 3, 1905, the executrix and executors being directed by an order of that date to distribute to themselves as trustees under the will all of the property in their hands belonging to the estate and that they be discharged upon filing their receipt for the property, which receipt was filed on July 28, 1905; that after their discharge they sought the advice of the court and filed a bill to construe the will in certain particulars, a copy of the decision in which on appeal being attached to the bill and reported in 18 Haw. 34; that this court decided, among other things, that the widow and chil-
47 dren were not entitled to share in the income provided for in paragraphs 9 and 10 of the will until "after the administration is closed and the estate is distributed to the trustees;" and that in that suit no question was submitted as to when the administration closed and the estate vested in the trustees. The prayer is to fix the date when the administration closed and the estate was distributed to the trustees, so that they might know from what time they can apportion the income as provided in the will. Demurrers were filed by the guardians *ad litem* of the grandchildren on the grounds in substance (1) that the matters on which advice is sought have all been decided by this court in the decision referred to, and, if not, (2) want of equity, in that it appears from the bill when the

administration closed and the estate was distributed to the trustees. These demurrers were sustained and the bill dismissed. Plaintiffs appealed.

As the decision in the former suit (18 Haw. 34) was expressly made a part of the bill in this case, there is no doubt but that the record and briefs in that case may be looked into in order to ascertain just what was actually submitted and decided. In that case there appeared most of the facts that are set out in the bill in this case. The will is sufficiently set forth in the decision in the former suit, so that it will be unnecessary to again set it out. One of the questions submitted in that case was "are the children and widow entitled to any share of the net income provided for in the 9th and 10th clauses of the will pending the closing of administration," it appearing from the facts in that case but not in the bill that all of the debts, expenses and legacies were paid by February 10, 1902, so that there was no reason why the administration should not then have been closed and the estate distributed, and it also appearing that the administration was actually closed and the property
48 ordered distributed on July 3, 1905. In response to that question this court said: "We have no hesitation in answering this question in the negative. It is only when the administration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income and it is only from that time that the accounts are to be kept separate and the income apportioned." What was concerned in the first suit was the disposition of the income which accrued from the death of the testator, namely, April 21, 1900, to July 3, 1905. What is concerned in this suit is the disposition of that part of the same income which accrued between February 10, 1902, and July 3, 1905. The plaintiffs in the former suit contended before this court, by way of suggestion, that the widow and children were not entitled to that income. The defendants at that time made various contentions in regard to that income, some contending that the widow and children were not entitled to it, others that they were entitled to it, and one that the widow but not the children was entitled to her share of it. Furthermore, a motion for a rehearing in that case was filed by one of the defendants and joined in by another, which raised exactly and identically the question now before us. This court in denying that motion said: "The court decided and intended to decide that the widow and children are not entitled at any time to any share of the net income referred to in the 9th and 10th clauses of the will pending the closing of administration. A reexamination of the matter strengthens that view." That the actual form of the question as propounded in the former suit was different from the form of the one now submitted is immaterial, in view of the fact that each question seeks advice as to whom certain income should go. It is clear that the question now submitted was submitted and decided in the former suit.

But, in view of all the circumstances, and of the apparent hardship upon three of the defendants, we will discuss the matter as though it never had been passed upon before.

49 The question is, from what date are the children and widow entitled to their proportions of the net income referred to in the 9th and 10th clauses of the will? The first paragraph of the will directs the executrix and executors "to reduce to possession all and singular my estate, real, personal and mixed, wheresoever situated; and to manage, control, care for and collect the income and revenue thereof pending the distribution thereof," as afterwards provided for. This clause would not admit of the possession and management by the trustees of the same property at the same time as that of the executrix and executors. After making provision for the payment of debts and of the legacy to the widow and in regard to the homesteads in Honolulu, the Will in clause 5 directs "that my executrix and executors do pay to my said wife, for the use of herself and our children, as a family allowance, such sum monthly as may from time to time be approved and decreed by the court having jurisdiction of the probate of this will. And the trustees herein provided for, from and after their entry upon their functions of trust hereunder, shall make such further provision for the maintainance of said children as is hereinafter directed." The subsequent direction as to the further provision for maintenance of the children is found in paragraph 10 of the will. Clause 5 of the will shows that the income for children begins only when family allowance ceases, namely, at the time when the administration is closed and the order of distribution made. This family allowance was continued as a matter of fact up to the time of the order of distribution. The will then provides that "at and upon the full payment and discharge of the obligations and bequests in paragraphs numbered respectively second and third hereof," (which date appears to have been February 10, 1902), "I will and direct that my executrix and executors shall, as soon as may be, conclude the probate proceedings hereunder and obtain a decree of distribution of my estate. And I do give, devise and bequeath unto the trustees hereinafter named, and to
50 those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest, residue and remainder of my estate, not hereinbefore otherwise given, devised or bequeathed." Thus the testator has expressly named the time when the trustees should take the property and enter upon their functions of trust, namely, at the date of the decree of distribution. The will makes provision as to the homesteads and then directs the trustees to reduce to possession all of the property distributed to them, and to hold, manage, control and preserve it, and to collect all the rents, issues, profits and income thereof, and to keep separate, during the life of the wife, the accounts pertaining to realty from the accounts pertaining to the balance. This direction as to the separation of the accounts shows very clearly, in connection with the next clause of the will giving the wife one-third of the net income from the realty, that this net income is that which is collected by the trustees after their entry upon their functions of trust. Then follows that portion of the tenth clause of the will which is applicable to the case at bar, as follows: "And the remaining two-thirds of the net income, rents, issues and profits of and from said realty, during

the natural life of my said wife, and after her death, the entire net sum thereof, shall be by my said trustees included in one fund with the net income and revenue of and from all my estate other than such realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than six months divided into as many equal parts as there shall be then *in esse* any of my children by my said wife, and shall be by said trustees paid to my said children from and after their respective majority or marriage share and share -like." This income to be paid to the children is to begin at the same time as the payment of income to the wife and is only income collected by the trustees after the close of administration.

It is argued that the testator never intended the children and widow to be deprived of income for more than three years
51 after the administration should have been closed and the decree of distribution made. The difficulty with that contention is that he has said in clear and unmistakable language what income is to be paid the widow and children and when its payment is to begin. That he did not intend that the widow and children should be without income at any time probably is so, and he provided against just such a contingency by directing a payment of family allowance during administration and of family maintenance and income after administration.

The case of *Lovering v. Minot*, 9 Cush. 151, is relied on by appellants. All that that case decided was that where the income of a testator's residuary estate is bequeathed to a legatee for life, and no time is prescribed in the will for the commencement of the enjoyment of such income, the legatee for life is entitled to the income of the residue, as afterwards ascertained, to be computed from the death of the testator. Thus, that case is easily distinguishable from the case at bar, as here the will has expressly named the time from which the income is to be computed and paid.

The claim of the grandchildren, made by their guardians *at litem*, that the date from which income should be computed and paid to the life tenants should be July 28, 1905, which was the date of the filing of the receipt by the trustees for the property, is without merit, for the reason that the testator has made the date of the decree of distribution the one to be followed.

All the other defendants except the grandchildren, although strictly neither appellants nor appellees, were allowed to present argument in support of appellants' position.

There was no error in sustaining the demurrers.

The decree appealed from is affirmed.

(Sig.) W. F. FREAR.
(Sig.) A. A. WILDER.
(Sig.) J. T. DE BOLT.

Holmes & Stanley, for plaintiffs.

S. H. Derby, E. M. Watson, A. G. M. Robertson, E. C. Peters, and C. F. Peterson, for defendants.

52 (Endorsed:) Supreme Court Territory of Hawaii. Abigail K. Campbell Parker, Joseph O. Carter, and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, Deceased, *v.* Abigail K. Campbell Parker, Abigail W. Kawananakoa, Alice K Macfarlane, Muriel K Campbell, a minor, Beatrice U. (Mary) Campbell, a minor, Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, Lydia Liliuokalani Kawananakoa, a minor and Alice E. K. Macfarlane, a minor. Opinion. Filed June 14, 1907. J. A. Thompson, Clerk.

53 In the Supreme Court of the Territory of Hawaii.

ABIGAIL K. CAMPBELL-PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, Deceased, Appellants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIE LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Appellees.

Appeal from Circuit Judge First Circuit.

Decree.

The appeal herein of the Petitioners from the Decree of the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Circuit, Territory of Hawaii, sustaining the Demurrers to Petitioners' Bill of Complaint having been heard and considered by the Court.

It is Ordered and Decreed that said Decree be and the same is hereby affirmed.

Dated, Honolulu, T. H. June 19, 1907.

By the Court:

J. A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

O. K. as to form.
H. & S.

(Endorsed:) No. 214. Reg. 1 188. Supreme Court Territory of Hawaii. A. K. Campbell Parker *et al. vs.* A. K. Campbell *et al.* Decree. Filed June 19, 1907, at 10 A. M. J. A. Thompson, Clerk. Kinney, McClanahan & Derby 303-305 Judd Bldg. Honolulu, Attorneys for —— —— (Office No. —.)

54 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Appeal.

Now comes Abigail K. Campbell-Parker, one of the respondents in the above entitled cause, and, conceiving herself aggrieved by the decree of the above entitled Court made and entered on the 19th day of June, 1907, in the above entitled cause, does hereby appeal from said decree to the Supreme Court of the United States, and prays that this appeal may be allowed, for the reasons specified in the assignment of errors; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, Honolulu, February 27 1908.

A. G. M. ROBERTSON,
Attorney for the Appellant.

And now, to wit, on the 27th day of February, 1908, it is ordered that the appeal be allowed as prayed for.

[Seal Supreme Court, Territory of Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

55 In the Supreme Court of the United States.

ABIGAIL K. CAMPBELL PARKER, Appellant,

vs.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased; ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Appellees.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

[Seal Supreme Court, Territory of Hawaii.]

To Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, Abigail W. Kawananakoa, Alice K. Macfarlane, Muriel K. Campbell, a minor, Beatrice U. (Mary) Campbell, a minor, Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, Lydia Liliuokalani Kawananakoa, a minor, and Alice E. K. Macfarlane, a minor, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal, filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein Abigail K. Campbell Parker is appellant, and you, Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, Abigail W. Kawananakoa, Alice K. Mac-
56 farlane, Muriel K. Campbell, a minor, Beatrice U. (Mary) Campbell, a minor, Abigail Helen Kapiolani Kawananakoa, a minor, David Kalakaua Kawananakoa, a minor, Lydia Liliuokalani Kawananakoa, a minor, and Alice E. K. Macfarlane, a minor, are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties on that behalf.

Witness the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii this 27th day of February, in the year of Our Lord one thousand nine hundred and eight.

[Seal Supreme Court, Territory of Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the foregoing Appeal and Citation and the receipt of a copy thereof admitted this 27th day of February, 1908.

HOLMES & STANLEY,
C. H. OLSEN,
Attorneys for Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased.
ALICE K. MACFARLANE,
In Person.
CHARLES F. PETERSON,
Attorney for Abigail W. Kawananakoa.
E. C. PETERS,
Guardian ad Litem of Muriel K. Campbell and Beatrice U. (Mary) Campbell, Minors.
E. M. WATSON,
Guardian ad Litem of Abigail Kapiolani Kawananakoa, David Kalakaua Kawananakoa, Lydia Liliuokalani Kawananakoa, Minors.
E. M. WATSON,
Guardian ad Litem for Alice E. K. Macfarlane, a Minor.

57 [Endorsed:] Supreme Court of the United States. Abigail K. Campbell Parker, Appellant, *v.* Abigail K. Campbell Parker, *et al.*, Appellees. Appeal and Citation on Appeal. Filed February 27, 1908, at 11.20 o'clock, A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii.

58 In the Supreme Court of the United States.

ABIGAIL K. CAMPBELL PARKER, Appellant,
vs.
ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Trustees under the Will and of the Estate of James Campbell, Deceased; ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Appellees.

On Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes Abigail K. Campbell Parker, the appellant in the above entitled cause, and says that in the record of the proceedings in said suit in the Supreme Court of the Territory of Hawaii, there is manifest error in this, to wit:

1. That the Supreme Court of the Territory of Hawaii erred in holding that the decision of said Supreme Court rendered in the cause entitled "Abigail K. Campbell Parker, *et al.* Trustees under the Will and of the Estate of James Campbell, deceased, *vs.* Abigail K. Campbell Parker, *et al.*, (Equity No. 1188), dated October 29th, 1906, was and is *res judicata* in the above entitled cause.

2. That the Supreme Court of the Territory of Hawaii
59 erred in holding that "the question now submitted was submitted and decided in the former suit."

3. That the Supreme Court of the Territory of Hawaii erred in holding that under the 9th and 10th Clauses of the Will of James Campbell, deceased, this appellant and the children of said testator, are not entitled to any share of the income of said estate prior to the actual distribution of the property of the estate of the trustees under the will.

4. That the Supreme Court of the Territory of Hawaii erred in affirming the decree of the Circuit Judge of the Circuit Court of the First Circuit, dismissing complainants' bill of complaint.

Wherefore, this appellant, Abigail K. Campbell Parker, prays that the decree of said Supreme Court of the Territory of Hawaii made and entered in the above entitled cause on the 19th day of June, 1907, be reversed; that the decree of said Circuit Judge dismissing complainants' bill of complaint be reversed; and that the Supreme Court of the Territory of Hawaii be ordered to enter a decree instructing the trustees under the Will of James Campbell, deceased, that this appellant and the children of said James Campbell, are entitled under the 9th and 10th Clauses of said Will to their respective shares of the income of said estate from and after the date of the last act of the executors and executrix of said will in the administration of said Estate, to wit, the 10th day of February, 1902, and that in contemplation of law the administration of said Estate was closed on said date.

W. G. M. ROBERTSON,
Attorney for Appellant.

Dated, Honolulu, February 27, 1908.

59*a* [Endorsed:] Supreme Court of the United States. Abigail K. Campbell Parker, Appellant, *vs.* Abigail K. Campbell Parker, *et al.*, Appellees. Assignment of Errors. Filed February 27, 1908, at 11:20 o'clock A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii. W. G. M. Robertson, Counsel for Appellant.

60 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees under the Will and Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Affidavit of George L. Bigelow.

UNITED STATES OF AMERICA,
Territory of Hawaii, Honolulu, ss:

GEORGE L. BIGELOW, being first duly sworn, on oath deposes and says:

That he is the cashier and book-keeper for Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased; that he is familiar with the accounts of said Trustees, is acquainted with the condition of said Estate, and knows the amount of income derived from the property, funds and investments of said Estate; that the net income derived from the real property belonging to said Estate from February 10, 1902, to July 3, 1905, amounted to about $236,684.47; that the net income derived from the personal property belonging to said Estate from February 10, 1902, to July 3, 1905, amounted to about $23,921.81.

(Sig.) GEO. L. BIGELOW.

Subscribed and sworn to before me this 26th day of February, A. D. 1908.

[N. S.] (Sig.) H. C. CARTER.
Notary Public, First Judicial Circuit, Territory of Hawaii.

Endorsed: Supreme Court of the Territory of Hawaii, October Term 1907. Abigail K. Campbell Parker *et al.* Trustees and Executrix, etc. *v.* Abigail K. Campbell Parker *et als.* Affidavit of George L. Bigelow. Filed February 27, 1908, at 11:20 o'clock A. M. J. A. Thompson, Clerk Supreme Court Territory of Hawaii.

61 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Bond on Appeal.

Know all men by these presents: That we, Abigail K. Campbell Parker, of Honolulu, Hawaii, Principal, and Samuel Parker, of the same place, Surety, are held and firmly bound unto the above named Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown, Trustees under the Will and of the Estate of James Campbell, deceased, in the sum of Five Hundred ($500.) Dollars to be paid to said Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown Trustees aforesaid, for the payment whereof well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents.

The condition of this obligation is such that whereas the said Abigail K. Campbell Parker has prosecuted an appeal to the Supreme Court of the United States to reverse the decree entered in the above entitled cause by the Supreme Court of the Territory of Hawaii:

62 Now, Therefore, the condition of this obligation is such, that if the said Abigail K. Campbell Parker shall prosecute said appeal to effect and answer all damages and costs if she fail to make said appeal good, then this obligation shall be void, otherwise of full force and virtue.

Dated, at Honolulu, February 27, A. D. 1908.

(Sig.) ABIGAIL K. CAMPBELL PARKER.
(Sig.) SAMUEL PARKER.

Endorsed: Supreme Court of the Territory of Hawaii. October Term 1907. Abigail K. Campbell Parker, *et al.* Trustees, Complainants, *vs.* Abigail K. Campbell Parker *et al.*, Respondents. Bond on Appeal. Filed February 27, 1908, at 11 20 o'clock A. M. J. A. Thompson, Clerk Supreme Court Territory of Hawaii.

63 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

ABIGAIL K. CAMPBELL PARKER, JOSEPH O. CARTER, and CECIL BROWN, Executrix and Executors and Trustees under the Will and of the Estate of James Campbell, Deceased, Complainants,

vs.

ABIGAIL K. CAMPBELL PARKER, ABIGAIL W. KAWANANAKOA, ALICE K. MACFARLANE, MURIEL K. CAMPBELL, a Minor; BEATRICE U. (MARY) CAMPBELL, a Minor; ABIGAIL HELEN KAPIOLANI KAWANANAKOA, a Minor; DAVID KALAKAUA KAWANANAKOA, a Minor; LYDIA LILIUOKALANI KAWANANAKOA, a Minor, and ALICE E. K. MACFARLANE, a Minor, Respondents.

Clerk's Certificate to Transcript of Record.

[Seal Supreme Court, Territory of Hawaii.]

UNITED STATES OF AMERICA,
Territory of Hawaii, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing appeal, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 62 inclusive, contain a true and complete transcript of the record and proceedings, including the original Appeal and Citation on Appeal and Assignment of Errors in said Court in the cause of Abigail K. Campbell Parker, Appellant, against Abigail K. Campbell Parker, Joseph O. Carter and Ceeil Brown, Trustees under the Will and of the E-tate of James Campbell, deceased, Abigail W. Kawananakoa, Alice K. Macfarlane, Muriel K. Campbell, a minor, Beatrice U. (Mary) Campbell, a Minor, Abigail Helen Kapiolani Kawananakoa, a Minor, David Kalakaua Kawananakoa, a Minor, Lydia Liliuokalani Kawananakoa, a Minor, and Alice E. K.
64 Macfarlane, a minor, Appellees, as the same remain of record and on file in the Clerk's Office of said Court.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of Honolulu, in the Territory of Hawaii, this 4th day of March in the year of Our Lord one thousand nine hundred and eight, and of the Independence of the United States, the one hundred and thirty-second.

[Seal Supreme Court, Territory of Hawaii.]

JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 21,077. Hawaii Territory Supreme Court. Term No. 107. Abigail K. Campbell Parker, appellant, *vs.* Abigail K. Campbell Parker, Joseph O. Carter, and Ceeil Brown, trustees under the will and of the estate of James Campbell, deceased, *et al.* Filed March 19th, 1908. File No. 21,077.

Office Supreme Court, U. S.
FILED.
JAN 21 1910
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

Nos. 106 and 107.

HAWAIIAN TRUST COMPANY, LIMITED, ET AL, EXECUTORS OF ABIGAIL K. CAMPBELL PARKER, DECEASED, APPELLANTS,

vs.

HEINRICH MARTENS VON HOLT, A. N. CAMPBELL, AND CECIL BROWN, TRUSTEES, ET AL.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
Attorneys for Appellants.

SIDNEY M. BALLOU,
MASON F. PROSSER,
ROBBINS B. ANDERSON,
F. E. THOMPSON,
C. F. CLEMONS,
Of Counsel.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

Nos. 106 and 107.

HAWAIIAN TRUST COMPANY, LIMITED, ET AL, EXECUTORS OF ABIGAIL K. CAMPBELL PARKER, DECEASED, APPELLANTS,

vs.

HEINRICH MARTENS VON HOLT, A. N. CAMPBELL, AND CECIL BROWN, TRUSTEES, ET AL.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

STATEMENT.

Case No. 106.

No. 106 involves an appeal from the decree of the Supreme Court of the Territory of Hawaii construing the will of one James Campbell, late of Hawaii. The appeal is so taken upon one only of the questions raised by the bill filed by the trustees thereunder and ruled in the court below.

No. 107 is an appeal from the decree of the same court affirming the decree below sustaining demurrers to a second

bill filed by such trustees for like purpose. The original appellant here in each case was Abigail K. Campbell Parker, widow of the testator Campbell, who recently, and since the docketing of each cause in the court, has died and her representatives have been duly substituted.

The relevant facts are:

James Campbell, late of Honolulu, died on or about April 21, 1900, leaving a large estate composed of both realty and personalty and which he disposed of by will duly admitted to probate in the court of appropriate jurisdiction on June 26, 1900 (R., 40, 41). Thereby his widow, Abigail K. Campbell, J. O. Carter and Cecil Brown were appointed as executrix and executors and also as trustees. The executrix and executors duly qualified as such and undertook the administration of the estate. Having paid all claims against the estate and all legacies provided therein, the executrix and executors were, on July 3, 1905, by order entered in the Circuit Court, first circuit, sitting in probate, formally discharged, their accounts approved, and they were directed to distribute to themselves, as in trust, the property belonging to the estate according to the direction of the will.

Doubt having arisen concerning the proper construction of the will in several particulars, the pending "Bill for Construction of Will" was thereupon filed by the trustees against the widow, children, and grandchildren, who were the sole beneficiaries in such trust estate, accompanied by copy of the testator's will. Among the questions submitted, the single question covered by the appeal in No. 106, is thus stated in the bill:

> "That the complainants are also uncertain whether
> " under the provisions of the ninth clause of the said
> " will the respondent Abigail K. Campbell Parker is
> " entitled to any share of the income of the realty
> " of the estate, pending the close of the administra-
> " tion and whether under the provisions of said tenth
> " clause of the said will, the children of the testator
> " are entitled to any share of the income of the estate

> "pending the closing of the administration of the "estate by the executrix and executors; and whether "or not a share of the income of the estate vests, in "any of them, during the minority or being minors "before marriage; and whether, if it so vest, such "share vests absolutely (the payment thereof only "being deferred until they reach majority or marry) "or contingently upon the reaching majority or "marrying" (R., 6).

The answer of the widow, Abigail K. Campbell Parker, responsive to the first question thus submitted in the foregoing paragraph of the bill, *supra*, claimed the right to receive (*inter alia*)—

> "also one-third of the net income, rents, issues and "profits from the realty, after the payment of the "costs and charges of the management, control and "preservation thereof and the repair of said resi- "dences at Emma street and Leahi, for and during "the term of her natural life; also the right of occu- "pancy of said residences during her natural life; "and also an allowance for her support during the "administration of said estate by the executrix and "executors" (R., 15).

Upon the hearing, certain documentary proof was presented covering the proceedings and accounting of the executrix and executors in the probate court, and rulings of the probate court thereon, resulting in decree in the present cause holding, *inter alia*,

> "(7) That Abigail K. Campbell Parker is not en- "titled under the ninth clause of the said will to any "share of the income of the realty of the estate pend- "ing the closing of the administration of the estate;"

and making like but separate ruling (par. 8) in respect to the children of the testator (R., 142).

On appeal by the parties defendant from the entire decree the Supreme Court of Hawaii rendered opinion ruling separately upon each point involved. In respect to the single

point presented by pending appeal the opinion of that court held:

> "Are the widow and children entitled to any share " of the net revenue provided for in the ninth and " tenth clauses of the will pending the closing of " administration?
>
> "We have no hesitation in answering this question " in the negative. It is only after the administration " is closed and the estate is distributed to the trustees " that either the widow or any of the children begin " to share in the income and it is only from that time " that the accounts are to be kept separate and the " income apportioned" (R., 156, 157).

And the decree entered thereon was that:

> "The decree appealed from is affirmed except as to " questions 2, 4 and 6 and as to those questions it is " reversed" (R., 163).

Inspection of the decision of the court will disclose that questions 2, 4 and 6 related to the proper application of certain specified sums, and as the Circuit Court had no discretion to further exercise in respect of the accounting and the specific sums involved in each of those questions, but solely the ministerial duty of reforming its decree to conform thereto, the decree of the Supreme Court was clearly a final decree, subject to present appeal, within the rule well settled in this court, and concisely stated by Mr. Chief Justice Fuller, in *Lewisburg Bank v. Sheffey*, 140 U. S., 445, 453, thus:

> "The subject was much considered and many cases " referred to and classified and the distinctions indi- " cated, in *Keystone Iron Co. v. Martin*, 132 U. S., 91. " It is there shown that where the entire subject-mat- " ter of a suit is disposed of by a decree, the mere " fact that accounts remain to be adjusted and the " bill is retained for that purpose, does not deprive " the adjudication of its character as a final and " appealable decree."

Upon the single point thus ruled adversely to the widow, that neither she nor the children took any share of the income of the realty pending closing of administration, Mrs. Campbell Parker took the appeal here pending, assigning error in such ruling (R., 166).

Case No. 107.

Following the decision of the Supreme Court in the main case (106), petition for rehearing was presented, wherein the court was asked to rule the precise period when administration of the estate was in fact so closed, and the trustees were authorized to take hold of the estate and become for any purpose authorized to act concerning any of the provisions of the will, such petition suggesting:

> "Was it (*a*), at the date of the death of the testator, "April 21, 1900; (*b*), at the date when the legacy "to the widow (of one-third the value of the personal "property) was finally paid, February 10, 1902; "(*c*), at the date of the *filing* of the final accounts "and petition for discharge by the executors, August "25, 1902; (*d*), at the date when the decree of dis-"tribution was *signed* by the Circuit Judge, July 3, "1905; or (*e*), was it at such time when the adminis-"tration *should have been*, but was not in fact, *closed*, "owing to the delays of obtaining hearings, awaiting "decisions approving such accounts, remodeling and "filing new accounts to conform to such decisions, "and other delays for which this respondent is not "responsible" (R., 159).

The court denied such petition, observing that

> "The court decided and intended to decide that the "widow and children are not entitled at any time to "any share of the net income referred to in the ninth "and tenth clauses of the will pending the closing of "administration" (R., 162).

This ruling still left the trustees in doubt when, under proper construction of the will, administration thereunder

should be deemed to have closed. Thereupon they filed a bill against all the beneficiaries under the will, setting forth that as early as February 10, 1902, they as executrix and executors had paid all debts of decedent and had also fully paid to his widow, Abigail Campbell Parker, the full one third portion of the value of the personalty specifically bequeathed to her and being the only legacy with which payment they were charged under the will, and further averring:

"XVII.

"That doubts have arisen in the minds of the com-
" plainants as to the true construction of paragraphs
" ninth and tenth of the said will and particularly
" whether or not the administration of the said estate
" closed and the said estate vested in these complain-
" ants as such trustees as aforesaid or, for the purpose
" of determining the rights of the said A. K. Camp-
" bell Parker, Abigail Kawananakoa and Alice Mac-
" farlane to such income, the said administration shall
" be deemed to be closed and the said estate shall be
" deemed to be vested in these complainants as such
" trustees as aforesaid, at and upon the full payment
" and discharge of the obligations and bequests con-
" templated in paragraphs numbered 'second and
" third' of the said will, that is to say, on the 10th
" day of February, 1902, or on the filing by the
" complainants of their first and final account as such
" executrix and executors, and of their petition for
" the allowance of such accounts and for an order
" to deliver such of the property of the estate as re-
" mained in their possession to the persons entitled
" thereto and discharging them from all further re-
" sponsibility as such executrix and executors as
" aforesaid, to wit, the 25th day of August, 1902, or
" at any other date prior to the 28th day of July,
" 1905, which date it is necessary to determine for
" the purpose of ascertaining the date from which
" the said A. K. Campbell Parker is entitled to one-
" third of the income from the said real property and

> "the said Abigail Kawananakoa and Alice Macfar-
> "lane are entitled to a share of the income from the
> "said real and personal property; and that conflict-
> "ing claims are being made by and on behalf of said
> "respondents in this regard" (R., 6, 7).

To this bill all of the grandchildren, through guardians *ad litem*, filed demurrers, setting up the plea of *res adjudicata* under the decision and decree of the Supreme Court of Hawaii in the former case (106). Such demurrers were sustained and the bill ordered dismissed, and on appeal by the trustees such decree was affirmed (R., 28, 33).

And from this latter decree the present appeal is now taken by the widow, Abigail K. Campbell Parker, and continued by the representatives of her estate. In each case the interest of the widow was distinct and separate from those of the other named beneficiaries under the will, to wit, the children of the testator, and who were also made defendants in each bill.

The will separately provided for the widow, as its provisions plainly show. Her claim of right to receive thereunder one-third of the income of the realty from the death of the testator was a matter wholly personal to her. Hence her separate appeal was fully authorized under the settled rule in this court clearly and concisely stated in *Gilfillan v. McKee*, 159 U. S., 303, 312, thus:

> "The objection that an appeal was not taken by
> "the other defendants; that they did not join in the
> "appeal, and that there was nothing in the nature of
> "a summons and severance is equally untenable. The
> "decree was several, both in form and substance, and
> "the interest represented by each defendant was sepa-
> "rate and distinct from that of the other. In such
> "cases any party may appeal separately to protect
> "his own interest. *Cox v. United States*, 6 Pet., 172;
> "*Todd v. Daniel*, 16 Pet., 521; *Hanrich v. Patrick*,
> "119 U. S., 156; *City Bank v. Hunter*, 129 U. S.,
> "557, 578."

Each of the trustees and all other defendants were duly served with citation on each appeal (No. 106, R., 135; No. 107, R., 36).

The amount of the income derived from the realty of the estate between February 10, 1902 (when the executrix and executors had paid all debts and the legacy to the widow), and July 3, 1905, when final order of discharge was entered, appears by the affidavit of the book-keeper of the estate to have been about $236,684.47 (No. 106, R., 167; No. 107, R., 38), whereof the widow and original appellant here claims one-third, under her husband's will, or some $80,000. It thus appears that the separate interest of the widow in such funds and as directly involved in each of the pending appeals far exceeds the required jurisdictional value here.

Assignment of Errors.

These appear in the record (p. 37) and are in substance:

1. In holding the matters involved *res adjudicata* because "the question now submitted was submitted and decided in the former suit."

2. In denying the right of the widow and children to any share of the income "prior to the actual distribution of the property of the estate of (to) the trustees under the will."

BLURRED

ARGUMENT.

The will of Mr. Campbell appears in the record of each case (No. 106, R., 7-13; No. 107, R., 8-13). While it is an extended document, its main provisions are:

1. Directing his executrix and executors to reduce to possession all of his estate, "and to manage, control, care for "and collect the income and revenue thereof, pending the "distribution thereof as hereinafter provided," and to cause judicial appraisement of the value thereof by the court of appropriate jurisdiction.

2. To pay all debts outstanding against the testator, including expenses of his last illness and funeral.

3. To his wife testator bequeathes a sum of money equal to the one-third of the value of his personal property as should be thus judicially ascertained. That sum the executrix and executors are directed to so pay her in cash, or from time to time "as rapidly as the income and interests of my "estate shall permit, without the sale of any real estate or "the sacrifice of any personal property as a means of rais-"ing such sum," but "the entire sum shall be paid within "two years from the date of my decease" and without interest. "The said sum to be and become the absolute, sepa-"rate property of my said wife."

(This sum was duly ascertained and paid within the period required, to wit, February 10, 1902.)

4. The widow for life and each of his children until their marriage to have the free occupation of the two family mansions described, with furniture and appurtenances, the executrix and executors or the trustees named in his will to keep such properties in suitable repair "at the charge of my es-"tate" during such residence by his widow and children, and on the death of his wife and upon any child losing such right of residence, then at the expense of the children entitled to occupy the premises.

COPY

5. By the fifth paragraph it was provided:

> "I direct that my executrix and executors do pay "to my said wife, for the use of herself and our "children, as a family allowance, such sum, monthly, "as may from time to time be approved and decreed "by the court having jurisdiction of the probate of "this will. And the trustees herein provided for, "from and after their entry upon their functions of "trust hereunder, shall make such further provision "for the maintenance of said children as is herein-"after directed."
>
> No. 106, R., 8; No. 107, R., 16.

6. The sixth paragraph provided:

> "At and upon the full payment and discharge of "the obligations and bequests contemplated in para-"graphs numbered respectively second and third "hereof, I will and direct that my executrix and "executors shall, as soon as may be, conclude the "probate proceedings hereunder, and obtain a decree "of distribution of my estate. And I do give, devise "and bequeath unto the trustees hereinafter named, "and to those of them who shall be living and resi-"dent in the Hawaii Islands at the date of such "decree, all the rest, residue and remainder of my "estate, not heretofore otherwise given, devised or "bequeathed. To HAVE AND TO HOLD unto said trus-"tees, their respective heirs, executors, administra-"tors, assigns, and successors in trust hereunder, for-"ever. BUT IN TRUST NEVERTHELESS, for the uses "and purposes hereinafter expressed and set forth, "that is to say:—"

7. The trustees were directed to permit continued use of the residence properties by the widow and children, as prescribed in paragraph fourth of the will, to maintain and keep the same in repair, and on full termination of the right of free occupancy provided for in the fourth paragraph, to then make amicable partition of that property, as the then beneficiaries should agree, or on failure so to agree then by resort to judicial partition.

8. Paragraphs 8, 9 and 10 are so important in the determination of the question here presented, that for convenience they are here set out in full:

"Eighth: With respect to all property which shall "be so distributed to them, other than that mentioned "in the last preceding paragraph, I direct my trus- "tees aforesaid, to reduce it to possession, and to hold, "manage, control, preserve and direct it; and to pay "all costs and charges thereof, including their own "commissions for such administration. And to col- "lect all the rents, issues, profits, income and revenue "thereof, and collect and realize upon all credits and "securities, at such times, and in such manner, and "upon such terms as to them shall seem best—and "to invest and reinvest, and keep invested—and at "will to change the investments of any and all "moneys that shall come to their hands by virtue "hereof, and which are not otherwise herein specific- "ally bequeathed, assigned or appropriated; and to "segregate, and keep separate and apart, (during the "life of my wife), the accounts of and pertaining to "the realty of my estate from the accounts pertain- "ing to any and all other thereof.

"Ninth: And from and out of the net income, "rents, issues and profits of and from the realty last "aforesaid, said trustees shall pay the equal one third "part or portion thereof, in semi-annual or, (at the "discretion of said trustees), more frequent payments "to my said wife, for and during the remainder of "her natural life. TO HAVE AND TO HOLD the "amounts herein provided so to be paid, as and for "her absolute and separate property—unto my said "wife, her executors, administrators and assigns for- "ever.

"Tenth: And the remaining two-thirds of the net "income, rents issues and profits of and from said "realty, during the natural life of my said wife, and, "after her death, the entire net sum thereof, shall "be by my said trustees included in one fund with "the net income and revenue of and from all my "estate other than such realty, which shall be under "their control by virtue of this will, and such fund

"shall be by them at stated intervals of not more "than six months, divided into as many equal parts "as there shall be then *in esse* any of my children "by my said wife, and shall be by said trustees paid "to my said children, from and after their respective "majority or marriage, share and share alike; *pro-* "*vided*, that if any of my said children shall decease, "leaving lawful issue, such issue shall stand in the "place or places of his, her, or their parent or parents "in all respects concerning the division, payment "and receipt of the fund herein mentioned; and "*further provided* that during the minority of said "children respectively, and while they shall respect- "ively remain unmarried, within such majority, "such trustee shall provide him her or them being "so minor and unmarried, with suitable maintenance "and education, and funds for foreign travel, in so "far as the same shall be suitable and desirable to "their means and condition; and all sums expended "under this provision shall be charged to Family "Maintenance, and none of it shall be charged to "said children, or any of them individually. And "any surplus revenues arising or remaining under "the provisions of this paragraph, shall become a part "of the principal of my estate, and shall be invested "and reinvested as such. The sums expended for "family maintenance hereunder shall not be reck- "oned as a part of such net income as herein pro- "vided."

9. By paragraph 11, the beneficiaries were forbidden to anticipate payments; under the will payments to them except *in personam* were prohibited, unless absent from the territory.

10. By paragraph 12 the interests of the female beneficiaries were directed to be taken and held free from any debts or control of their husbands, and that the trustees should keep the estate under the name of "The Estate of James Campbell," and "that the realty thereof" (except as herein provided in the case of said residence premises) "shall "be particularly and expressly preserved intact and shall be

"aliened only in the event and to the extent, that the ob-
" vious interests of my estate shall so demand."

11. By paragraph 13, on the death of the survivor among the widow and children, the trust should continue "for the definite term of twenty years after the " decease of such survivor, provided any such lawful issue as " aforesaid shall live so long, and if not, then for such lesser " term and period as he, she, or they shall live"—thus continuing the trust for the longest period of time available under the rule against perpetuities. And by paragraphs 14, and 15, at the end of such period the estate should be partitioned and conveyed either among the lawful issue of his children then *in esse*, or failing such then "to my right heirs, * * *."

12. The sixteenth paragraph provided:

> "The provision herein made for my wife is in-
> " tended, and shall be by her accepted (if at all), in
> " lieu and full satisfaction of her dower interest in
> " my estate. * * *."

13. The remaining paragraphs appoint the executrix and executors, and the same persons in turn as trustees with provisions for choice of new trustees and other administrative directions not material to pending inquiry.

While the estate was in the hands of the executrix and executors as such, they recognized the right of the widow to receive the one-third share of the net income from the realty as from the time of her husband's death, and paid to her on that account some $53,000.

(No. 106, R., 71.)

When the matter of the allowance of their accounts came before the proper Circuit Court sitting in probate, the court ruled at length upon the question: affirmed the right of the widow to receive such one-third share of the net income of the realty received by the executrix and executors, but disallowed the payment *by them* on the sole ground that it

was due only from the trustees when taking over the estate at the close of administration, and that the executrix and executors were without power to make the same while acting as such and not in their separate capacity as trustees.

The reasoning and conclusions of the Circuit Court on this point are elaborately set forth in the record (No. 106, pp. 72-79) and are too lengthy to here repeat. We invoke careful consideration of the Circuit Court's entire statement and opinion on this point, however, because conscious that counsel cannot improve upon the clear and convincing reasoning presented by that learned court. Indeed the entire argument could most appropriately be submitted upon that decision. We shall only briefly supplement same in response to the adverse ruling of the Supreme Court of Hawaii in *this* proceeding.

A.

The misconception of the meaning of the testator's will in this regard indulged by the learned court below, is primarily founded upon the assumption that because the testator did not in terms direct the executrix and executor to keep the income arising from *realty* separate from the income arising from *personalty*, but by paragraph eight, so directed the trustees to keep such separate accounts during the life of his wife, *therefore* the testator intended that the net income arising from the realty after the trustees as such came into possession of the estate, was the net income and the only net income arising from the realty in which his wife should thereafter share.

The first and obvious answer to that assumption, however, is that the will did not *require* any such direction by the testator in respect of income while being administered by the executrix and executor. Any proper accounting by such administrators which would pass the scrutiny of the probate court in necessary approval of their accounts required such separation, for the settled rule applicable to such a case as

is here presented where the executor is expressly authorized to receive the income from realty is well stated in *Am. & Eng. Ency. of Law*, Vol. II.; title, Executors and Administrators; sub-head, "Accounting," p. 1210, thus:

> "The rents and profits of real estate, may, by the "will of the deceased owner, be made assets with "which the executor or administrator is chargeable, "either by a devise to him, or by a power of sale "which operates as an immediate conversion of real "estate into personalty or by any other testamentary "provision which gives the executor or administrator "as such the right to receive rents and profits."

The testator could neither change nor control that administrative procedure by mere silence in his will. But when the trustees under the specific trusts created by the will came into actual possession of the estate, the testator's specific direction was proper and would so control. It is obvious that the legal mind which drafted this will readily understood and applied this distinction and as clearly the testator so understood it because by the third paragraph of his will he directs the pecuniary legacy to his wife of "a sum of money "equal and equivalent to a one-third ($\frac{1}{3}$) proportion of the "sums which, in accordance with paragraph numbered first "hereof, shall be finally decreed and determined to be the "value of the personal property *only*, belonging and pertaining to my estate, at the date of such decree and determination" (of valuation provided for in paragraph one), shall be so paid "without the sale of any real estate or the sacrifice "of any personal property as a means of raising such sum."

Hence separate accounting as between income of realty and personalty was an obvious *necessity* in the orderly accounting and administration of the estate. Because it was not in terms directed by the testator, we submit cannot justify taking the omission of such unnecessary direction as the basis of interpreting the will and the testator's intention thereunder *against* the manifest *first* recipient of his

bounty, and for whose rights and interests the whole will exhibits the highest solicitude. In short, the testator plainly intended to so provide for his wife as to make her the full common law provisions, for by paragraph sixteen he declares that:

> "The provision herein made for my wife is in-
> "tended and shall be by her accepted (if at all) in
> "lieu and *full satisfaction of her dower interest* in
> "my estate."

B.

The pecuniary legacy made to the wife of "a sum of "money equal and equivalent to one-third (⅓) proportion, "* * * of the value of the personal property only" (paragraph 3) means the full value of such personal estate as should be so judicially valued as directed in paragraph one. That furnishes an exact and certain base. All personal property, including as of course cash on hand, at the testator's death, was to be so included in such valuation. Of that aggregate value the widow was to receive and did receive one-third, but as most pertinently observed in the decision of the court sitting in probate upon the accounts of the executrix and executors and above cited (No. 106, R., 73):

> "If this is not the correct interpretation of this
> "will then Mrs. Parker would be much better off to
> "have her dower assigned. Even if she had made
> "her election before this it would not bind her if
> "given under a misapprehension of the true inter-
> "pretation of the will.
>
> "At the time the property was valued for the pur-
> "pose of appraising it to determine the sum due Mrs.
> "Parker as the value of one-third of the personalty
> "there had been quite a sum collected as income
> "from the realty which the master refused to take
> "into account in making his computation on the
> "ground that Mrs. Parker would receive her
> "one-third of the amount under the will as income
> "from realty. If now it be denied her she will, in-
> "stead of being paid twice, lose it altogether."

Under the ruling of the Supreme Court of Hawaii here under review, that is precisely what will happen—a result of plain wrong and hardship.

C.

The will provides, in paragraph 16, that "The provision herein made for my wife is intended and shall be by her accepted (if at all) in lieu and full satisfaction of her dower interest in my estate."

The widow, having accepted the provisions of the will, has placed herself in the position of a purchaser for value, entitled to all the advantages of that position.

Mrs. Parker had no desire to obtain through this litigation anything above what she believed that she was actually entitled to. But on the other hand, she did not feel called upon to relinquish anything which was due her upon a fair construction of the will.

Every widow is entitled to a life interest in one-third of her deceased husband's realty, and to an absolute estate in one-third of his personalty. This dower right cannot be taken from the widow by the will of her husband without her assent.

Where, therefore, a widow accepts a provision in her husband's will as a substitute for her dower right she is regarded as a purchaser for a valuable consideration. Her claim is a preferred one, and she is entitled to receive all that is so given her by the will, although other legacies and devises may have to abate to pay debts.

Borden v. Jenks, 140 Mass., 562;
Pollard v. Pollard, 1 Allen, 490;
Security Co. v. Bryant, 52 Conn., 311;
Lord v. Lord, 23 Conn., 327;
In re Gotzian, 24 Minn., 159;
Howard v. Francis, 30 N. J. E., 444.

The favored character of the widow's claim is clearly shown by the cases cited.

The fact of the widow being a purchaser for value marks the difference between her position and that of the children who are mere volunteers.

> "But even if the general rule were otherwise, I think the fact that the wife's life estate in the residue, in this case, is given in lieu of her dower, would be sufficient to take it out of the general rule so as to give her interest from the death of the testator, as in the case of a legacy to a child having no other means of support from the bounty of the testator. Indeed, a legacy to the widow in lieu of dower is viewed in a more favorable light than a legacy to a child; the widow taking the bequest as an equivalent for her relinquishment of a right, and the child taking it as a mere bounty of the testator."
>
> *Williamson v. Williamson*, 6 Paige, 298, 305.

The legacy of the value of one-third of the personalty given the widow in paragraph three would have drawn interest if the will had not provided to the contrary. The provision for family support under paragraph five is to be regarded as in lieu of such interest, but it should not be regarded as also postponing the widow's share in the income from the realty.

> "Annuities given by will shall commence on the testator's death; the first payment is therefore to be made at the expiration of one year thereafter, or if payable quarterly, at the end of the first quarter."
>
> 2 *Woerner, Adm.*, Sec. 454;
> *Lamb v. Lamb*, 11 Pick., 370, 376;
> *Lovering v. Minot*, 9 Cush., 151;
> *Pollock v. Learned*, 102 Mass., 49, 54;
> *Sargent v. Sargent*, 103 Mass., 297, 299;
> *Ayer v. Ayer*, 128 Mass., 575;
> *Williamson v. Williamson*, 6 Paige, 298;
> *Green v. Green*, 30 N. J. E., 451;
> *Van Blarcom v. Dager*, 31 N. J. E., 795;
> *Green v. Blackwell*, 32 N. J. E., 768, 773;
> *Pell v. Mercer*, 14 R. I., 412, 432.

The cases cited show the distinction between interest on specific legacies and cases where the bequest is of the income for life in the residuum. They also point out that it makes no difference that the gift purports to be payable at the close of the administration, nor that a trustee is interposed between the gift and the taker.

> "There is no substantial difference in legal aspect between the gift of an annuity for life, and of the interest or income of a fund for life."
>
> *Flickwirs Estate*, 136 Pa. St., 374, 381

> "The rule is that where the residuary personal estate is given to the legatee for life, the interest which accrues thereon from the time of the death of the testator shall in the absence of any direction to accumulate, go to the life tenant, is established. It does not rest on the presumption that the life interest was given for support, but on the equity which seeks to give to each (the life tenant and the remainderman) his due. If the distribution, or payment, or delivery of the residuary estate be postponed until the end of a year from the death of the testator, the share assigned to Mrs. Blackwell must include her share of the interest earned by the securities in which the residuary estate has been invested. To give the interest to the remainderman, by treating it as part of the principal would be unjust to her."
>
> *Green v. Green, supra.*

> "We think, therefore, that when the funds were transferred from the executors to the trustees, the assets showing what was received from income and what from capital, it was the duty of the trustees to distribute that part of it which was composed of interest, and retain the amount of capital as it existed at the decease of the testator, as the capital sum, constituting the residue, to be invested and held under the trust. * * * It is a question between the first *cestui que trust* for life and the remainderman. The effect of a different decision would be to apply the first year's income to increase the capital; to take it

> from the first taker, and apply it to an accumulation for the benefit of the future taker."
>
> *Lovering v. Minot, supra.*

> "In this court, the general rule is established, that the tenant for life is entitled to the income of a residue given in trust, from the time of the testator's death; because any other rule would take away the income from the tenant for life, and apply it to the increase of the capital for the benefit of the remainderman."
>
> *Sargent v. Sargent, supra.*

We submit, therefore, that there is abundant reason for holding that the widow's one-third of the income from the realty commences from the death of the testator. And we contend that the court below was clearly wrong in holding that the expense of maintenance and education of the children (erroneously called in the decree "Family Maintenance") is to be paid by the trustees out of the income of the realty *before deducting* Mrs. Parker's share. By the express terms of paragraph ten of the will that expense is to be paid out of the fund composed of "the remaining two-thirds" of the net income from the realty, plus "the net income and revenue of and from all my estate other than such realty."

D.

It is, we submit, clear that the court below confused the *time* for payment of the widow's interest in the income from realty with the *period* which such income properly covered. Otherwise stated, her interest in the income from the realty was *vested* from the time of the testator's death and hence necessarily took effect as of that date. The delay required for the ascertainment and payment of the testator's debts and for the payment of the pecuniary legacy to her made by paragraph third of the will may have *postponed* payment to her of such vested share in such income, but did not and

could not postpone also the time from which such payment should be computed. By paragraph third she was given one-third of the personalty absolutely. In that computation of value, income from realty was *excluded*, as expressly stated in the decision of the Circuit Court sitting in probate and quoted *supra*. Manifestly what was thus excluded, and upon the express ground that she would receive one-third of that fund under paragraph ten as income from realty, could not be thereafter appropriated as principal of the personal estate and on that ground her right to one-third thereof given under paragraph nine denied. The will must be read by its four corners and thus interpreted as a whole. Ignoring that essential requirement, the court below interprets paragraph nine as giving her a share only in income from realty earned and accruing *after* the trustees as such came into possession of the estate, thus converting income from realty into personalty by pure construction and ruling to her prejudice thereon. And this apparently because the testator omitted to direct that the executrix and executors should separately keep and render account of the income from the realty. Such conclusion is hence founded primarily upon the testator's silence in respect of a matter whereon he did not need to speak.

While the realty was devised to the trustees, the widow and children instantly became the beneficial owners of the estate. Whatever its value and whatever it earned after the testator's death belonged to them. The trustees were and are holders merely of the legal title thereto and necessarily took same under the will the moment it became operative upon the death of the testator. The widow and children then *in esse* became vested under the law with the real beneficial interest. The trustees were appointed and the trust created solely to carry out the testator's expressed intent. The dominant intent of the testator to give the widow one-third of the personal estate and also the one-third of the net income from the realty for life and the rest to his children and grandchildren

is too plain to require discussion. The will in that regard is precisely what the law would have provided had Mr. Campbell died intestate, except, of course, the limitation of the children's interest to a life estate. In nothing which he further added was this dominant intent changed or impaired. What he did add expressed only the plain purpose to provide them with a common "family allowance" pending the necessary administration of his estate, and to also provide for their continued family occupancy of the family homes until the death of his wife and the death or marriage of each of his children. To read his will in these added particulars as changing his dominant intent to thus distribute the great bulk of his large estate is to make the mere incidents of his testament control his plain and primary purpose. Absence of a "family allowance" for maintenance until the close of administration of the estate in the probate court might have seriously embarrassed his wife and children, who were the sole objects of his thought and care, as his will plainly discloses. To avoid any such consequence he provided against it. The *only* added directions were the provision for the family allowance, the occupancy of the family residence, and limiting the interest of his children to an estate for life. In that regard *he* provided what the law otherwise did not. But to say that he intended to change the settled rules of law in respect of marshaling interests in realty and personalty and substitute one for the other is to put a strained construction upon his *intention* and make his silence in the mere matter of *form* of accounting dominate the entire instrument and control what would be otherwise its plain meaning. *Contra*, and guided by the settled rules of interpretation relating to wills, we submit that what the law would give and the manner in which the law would distribute controls unless a plain meaning to the contrary is found in the will of the testator. All presumptions attend *such* construction of this will, and we submit that taken as a whole nothing is found therein to establish a contrary intention.

BLURRED CO

E.

It seems to be a settled rule that when a person dies leaving a will and personalty and real property, pecuniary legacies bequeathed by the will are primarily to be paid from the personal property, and in case the personal property is insufficient, unless the clear intention of the will is to the contrary or there be express provisions in that regard, which charges the realty with the payment of the legacy, the legacy fails. If there is no express provision made by the testator by whom or from what fund a legacy is to be paid, in the event the personalty is not sufficient to liquidate the legacy, the courts seem agreed that the legacy fails.

Harris v. Fly, 7 Paige N. Y., 421, 425.
Lehigh v. Savage, 14 N. J. E., 124, 129.

The courts of Massachusetts have gone so far in the case of *Seaver v. Lewis*, 14 Mass., 83, 85, as to say:

> "That the personal estate alone is the proper fund for the payment of debts and legacies, and must be so applied unless it be exonerated either by express words or by necessary implication."

And in *Hoes v. Van Hoesen*, 1 N. Y., 120, 123, the court holds that the mere making of a provision for the payment of debts or legacies out of the real estate does not discharge the personalty. There must be an intention not only to charge the realty, but to exonerate the personalty; not merely to supply another fund, but to substitute that fund for the property antecedently liable.

It is obvious from the foregoing that the context of the will must be resorted to for the purpose of ascertaining whether or not the testator intended that the realty should, in case of insufficiency of the personalty, aid the personalty to the extent of the amount necessary for the payment of the legacy.

OPY

In the will at hand there seems to be no reason why the fundamental and original rule relative to the use of personalty for the payment of legacies should not apply. The legacy in favor of the widow is neither specific nor demonstrative; no fund or funds are particularly described out of which the payment is to be made, excepting in the event that "the condition and interest" of the estate does not permit the payment of the entire sum contemplated to be paid to Mrs. Campbell; the will expressly directing that if the cash on hand and personalty to be converted into cash, is sufficient for the payment of the legacy, then such cash and such converted personal property shall primarily be liable for the legacy.

There are, to be sure, authorities to the effect that where the will provides for the blending of the personalty and realty in the residuary legatee, it naturally implies that the personalty and realty shall be subject to the payment of the legacy.

Lewis v. Darling, 16 Howard, U. S., 1:

But the will here sought to be construed has segregated realty and personalty under the residuary clause. The income of the realty and personalty are expressly divided into separate sums, each reserved for the performance of specific purposes under the trust.

The converse of the authorities above cited, that the personalty unless ordinarily exonerated shall alone be held responsible for the payment of legacies, would necessarily hold, namely,—that unless it affirmatively appears to have been the intention of the testator to charge the realty with the payment of the legacies, the realty is not liable. Nor is the fact that the legacy is given in lieu of dower enough to make its payment a charge upon the realty. In the event the personalty was insufficient the fact that the legacy was taken in lieu of dower might be an equitable reason for charging the realty with a deficit, but is not in itself suffi-

cient to make the payment of the legacy chargeable to or a lien upon the realty.

Conrad's Appeal—37 Penn. State, 47, 49

In the will at hand the sum of money bequeathed to the widow is clearly but equivalent to one-third of the value of the personalty at the time of the adjudication of the value of the entire personal estate, and it would necessarily include accrued revenues from the date of the testator's death to the time of the adjudication of such values. Where the widow is given the income of the residue of the estate during widowhood, she is entitled to the whole value of the income of the personal estate from the day of the death of the testator, and not from the time it is settled in the probate court.

Pollock v. Learned, 102 Mass., 55;

Such being the case, it seems that the will and the law clearly indicate that the widow is entitled to receive one-third of the income of personalty at the time of the adjudication as well as one-third of the personalty, and that the fund from which it is payable is the personalty and income therefrom existing at the time of the adjudication of the value of the personalty, which would include cash on hand at the death of the testator, converted personalty and income from personalty. The will seems to clearly indicate that it was the testator's intention that whatever else was done the widow should be paid her one-third proportion of the value of the estate, and in order to accentuate that fact the payment was to be made within two years. It also seems clear that the testator intended that both the realty and the income therefrom should be free from any charge in connection with the legacy. He excluded the right of sale of real estate and directly points to the sale of personalty, only providing that such sale should be made without sacrifice.

There can hence be no question but that the testator intended that the usual rule of law applicable to payment of

legacies should not be departed from and that the realty, together with the accrued income therefrom up to the time of the distribution to the trustees, was to remain intact.

II.

Case No. 107.

As stated *supra*, the bill in this second suit was filed by the trustees to obtain judicial determination of the point of time when administration ceased, within the meaning and intent of the testator as expressed in his will, and the full duties of the trustees came into existence. The long delay which the cause and the parties thereto had suffered in the probate proceedings and the causes thereof are fully set forth in paragraphs VI to X, inclusive, of the stated bill (R., 2-4).

For these delays this appellant was in no manner responsible either as executrix or beneficiary. Without criticism of the probate court, but solely as a fact, it is earnestly insisted that when all duty in respect of payment of the testator's debts and payment of the legacy to the widow (the sole duties imposed upon them by the will) had been performed, as early as February 10, 1902, and their final accounts had been filed for approval, on August 25, 1902, it is plainly most unjust, and hence inequitable, to take from the widow this large sum of $80,000 solely because the will contemplated a decree of distribution and such decree was postponed until July 3, 1905. *Contra*, the will in terms (paragraph sixth) provided that "At and upon the full payment and discharge "of the obligations and bequests contemplated in paragraphs "numbered respectively second and third hereof I will and "direct that my executrix and executors shall, as soon as "may be, conclude the probate proceedings hereunder and "obtain a decree of distribution of my estate." Manifestly, the testator's dominant intention was that when the executrix and executors had *in fact* performed the duties assigned them

BLURRED

under the will the actual duties of the trustees and for the *then* benefit of the beneficiaries should *begin*. The direction to *then* (for such is the meaning of the words "as soon as may be") obtain a decree of distribution was a formal direction, because such "decree of distribution" was necessary to conclude the proceedings in the probate court. But if the decree was not so obtained "as soon as may be" it certainly was not the intention of the testator that the actual enjoyment of the estate under the administration of the trustees should be indefinitely postponed. Five years elapsed between the probate of the will and such final decree of distribution to the trustees. Over three years of that period elapsed *after* the full discharge of all duties imposed by the testator upon the executrix and executors and nearly the same period *after* they had filed their final account. To hold that nevertheless the words of the will in respect of the final decree of distribution control against all other language found in the will and certainly against the testator's plain expectancy and intent *and to the obvious injury of his wife*, who was the first named object of his care and solicitude in his will, is to sacrifice substance to form and to interpret the will against his widow and against the rule of dower right which he was plainly recognizing and seeking to thereby enforce.

Such holding plainly violates the settled rule that equity regards that as done which ought to be done, and substitutes for the plain intention of the testator the rigid application of his written words. And it does this by so applying a *part* only of the words of his will, and ignoring the preceding words of paragraph six, which express his real purpose.

We therefore submit:

1. That the widow was, under the will, entitled to receive one-third of the net income of the realty accruing from the date of the testator's death, April 21, 1900, or if that contention be overruled, then

2. From the date when the executrix and executors had performed all duty required from them under the will,

COPY

February 10, 1902, when all debts and the legacy to the widow had been fully paid, or certainly from the date when their first final accounts were filed, August 25, 1902, and their discharge prayed. Clearly the testator intended that when the duties of the executrix and executors in the care of the estate thus *ceased* the duties of the same parties as trustees should immediately begin. In the most extreme view which can be justly taken against the widow her right to receive the one-third net income of the realty accruing thereafter certainly *then* began.

Respectfully submitted,

ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
Attorneys for Appellants.

SIDNEY M. BALLOU,
MASON F. PROSSER,
ROBBINS B. ANDERSON,
F. E. THOMPSON,
C. F. CLEMONS,
Of Counsel.

FILED.
JAN 20 1910
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 106.

HAWAIIAN TRUST COMPANY, LIMITED, ET AL., EXECUTORS OF ABIGAIL K. CAMPBELL PARKER, DECEASED, APPELLANTS,

vs.

HEINRICH MARTENS VON HOLT, ALBERT N. CAMPBELL, AND CECIL BROWN, TRUSTEES, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR THE TRUSTEES.

W. L. STANLEY,
HENRY HOLMES,
C. H. OLSON,
Attorneys for Trustees under the Will and of the Estate of James Campbell, Deceased.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 106.

HAWAIIAN TRUST COMPANY, LIMITED, ET AL., EXECUTORS OF ABIGAIL K. CAMPBELL PARKER, DECEASED, APPELLANTS,

vs.

HEINRICH MARTENS VON HOLT, ALBERT N. CAMPBELL, AND CECIL BROWN, TRUSTEES, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR THE TRUSTEES

BRIEF FOR CECIL BROWN, HEINRICH M. VON HOLT AND ALBERT N. CAMPBELL (THE SAID HEINRICH M. VON HOLT AND ALBERT N. CAMPBELL BEING SUBSTITUTED FOR ABIGAIL K. CAMPBELL PARKER AND JOSEPH O. CARTER, BOTH DECEASED), TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED.

The above entitled cause comes to this court on appeal from a decision of the Supreme Court of the Territory of Hawaii.

The suit was instituted by the trustees under the will and of the estate of James Campbell, late of Honolulu, deceased (then Abigail K. Campbell Parker, Joseph O. Carter and Cecil Brown), in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii to obtain a construction of the will of the said James Campbell.

The questions submitted by the bill of complaint were many, but this appeal is only concerned with two of them, which appear in the bill in this form:

That the complainants are also uncertain:

(1) Whether under the provisions of the ninth clause of the said will the respondent Abigail K. Campbell Parker is entitled to any share of the income of the realty of the estate pending the closing of the administration; and

(2) Whether under the provisions of said tenth clause of the said will the children of the testator are entitled to any share of the income of the estate pending the closing of the administration of the estate by the executrix and executors (R., 6).

The judge of the Circuit Court signed a decree which answers these questions in the following words:

> "(7) That Abigail K. Campbell Parker is not entitled under the ninth clause of the said will to any share of the income of the realty of the estate pending the closing of the administration of the estate";
>
> "(8) That none of the children of testator are entitled to any share of the income of the estate pending the closing of the administration of the estate": (R., 142).

On appeal the Supreme Court of the Territory of Hawaii affirmed this decree as to these questions. It is from this part of the decision of the Supreme Court of the Territory of Hawaii that the appellant has appealed to this court.

The assignment of errors includes the following:

> "(1) That the Supreme Court of the Territory of Hawaii erred in holding that 'It is only after the ad-

ministration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income.'

"(2) That the Supreme Court of the Territory of Hawaii erred in deciding that this appellant is not entitled under the ninth clause of the will of James Campbell, deceased, to any share of the income of the realty of the estate pending the closing of the administration of the estate.

"(3) That the Supreme Court of the Territory of Hawaii erred in deciding that none of the children of the testator are entitled under the tenth clause of the will of James Campbell, deceased, to any share of the income of the estate pending the closing of the administration of the estate.

"(4) That the Supreme Court of the Territory of Hawaii erred in affirming the decree of the Circuit Judge of the First Circuit Court as to the 7th question decided" (R., 166).

Facts.

The testator, James Campbell, left a large estate the value of which, as ascertained by the Probate Court pursuant to the "First" clause of the will, being:

Personalty	$1,073,225.73
Realty	920,180.00

The following dates are important:

April 30, 1900.	Testator died;
June 26, 1900.	Will proved in Honolulu;
January 1, 1901.	Abigail W. Kawananakoa, eldest child of testator, attained her majority;
February 10, 1902.	Debts and widow's legacy ("Third" clause of will) paid, and therefore the date of "the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered respectively "Second and Third" mentioned in clause "Sixth" of the will;

August	25, 1902.	Filing of executors' "First and Final Account" and "petition for order of distribution and discharge";
May	17, 1903.	Alice Macfarlane (second child of testator) attained her majority;
July	3, 1905.	Order of distribution and discharge on executors filing trustees' receipt;
July	28, 1905	Receipt of trustees to executors and therefore the discharge of latter.

By the "First" clause of the will the executors are directed

To reduce to possession all of the estate, real, personal and mixed;

To manage same and collect income thereof pending distribution;

To have same appraised; and

To secure an adjudication of the value thereof.

By the "Second" clause the executors are directed to pay debts and funeral expenses.

By the "Third" clause testator gives to his widow a legacy or sum of money equal to one-third of the sum which was found by the probate court to be the value of his personalty. Payment was to be made in cash and if condition of estate did not warrant the payment of the entire sum at one time, it was to be paid as rapidly as the income and interests of estate should permit, but the will provided that the entire sum should be paid within two years from the date of his decease. The two years expired April 30, 1902, but the legacy had all been paid by the 10th day of February of that year.

By the "Fourth" clause the widow and children are given the use, during the life of his wife, of testator's two residences; and each unmarried child thereafter.

By the "Fifth" clause testator directed his executors to pay to his wife for the use of herself and children as a family allowance such sum monthly as should be approved by the probate court.

The "Sixth," "Eighth," "Ninth" and the material part of the "Tenth" clauses are as follows:

> "Sixth: At and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered respectively SECOND and THIRD hereof, I will and direct that my executrix and executors shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate. And I do give, devise and bequeath unto the trustees hereinafter named, and to those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest, residue and remainder of my estate, not hereinbefore otherwise given, devised or bequeathed. To Have and To Hold unto the said trustees, their respective heirs, executors, administrators, assigns and successors in trust hereunder, forever. BUT IN TRUST NEVERTHELESS for the uses and purposes hereinafter expressed and set forth, that is to say:—"

(Clause "Seventh" deals with the residences and throws no light on the questions.)

> "Eighth. With respect to all property which shall be so distributed to them, other than that mentioned in the last preceding paragraph, I direct my trustees aforesaid, to reduce it to possession, and to hold, manage, control, preserve and direct it; and to pay all costs and charges thereof, including their own commissions for such administration. And to collect all the rents, issues, profits, income and revenue thereof, and collect and realize upon all credits and securities, at such times, and in such manner, and upon such terms as to them shall seem best, and to invest and reinvest, and keep invested, and at will to change the investments of any and all moneys that shall come to their hands by virtue hereof, and which are not otherwise herein specifically bequeathed, assigned or appropriated; and to segregate, and keep separate and apart, (during the life of my wife,) the accounts of and pertaining to the realty of my estate from the accounts pertaining to any and all other thereof.
>
> "Ninth: And from and out of the net income,

rents, issues and profits of and from the realty last aforesaid, said trustees shall pay the equal one-third part or portion thereof, in semi-annual or, (at the discretion of said trustees,) more frequent payments, to my said wife, for and during the remainder of her natural life. To HAVE AND TO HOLD the amounts herein provided so to be paid, as and for her absolute and separate property—unto my said wife, her executors, administrators and assigns forever.

"Tenth: And the remaining two-thirds of the net income, rents, issues and profits of and from said realty, during the natural life of my said wife, and, after her death, the entire net sum thereof, shall be by my said trustees included in one fund with the net income and revenue of and from all my estate other than such realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than six months, divided into as many equal parts as there shall be then *in esse* any of my children by my said wife, and shall be by said trustees paid to my said children, from and after their respective majority or marriage, share and share alike;"

Two of the children attained their majority prior to the date of the executor's discharge.

Mrs. Abigail K. Campbell Parker, one of the trustees and the appellant in her own right, died on the 31st day of October, 1908, and Heinrich M. Von Holt was appointed a trustee in her place; and Joseph O. Carter, also one of the trustees, died on the 27th day of February, 1909, and Albert N. Campbell was appointed a trustee in his place.

As trustees these appellees have no personal interest in the result of this appeal and therefore the court will be shown something of what can be said on both sides of the question

ARGUMENT.

How is the income of the estate "pending the closing of the administration" disposed of? Is it to be accumulated and added to the corpus or are the widow (now the widow's estate) and children entitled to it subject only to the payment of the debts and the legacy to the widow?

If the will consisted merely of the clauses "Second" (relating to debts), "Third" (by which a legacy is bequeathed to the widow), "Sixth" (devising the residuary estate to the trustees upon trust), "Ninth" (directing the payment of one-third of the income of the realty for life to the widow), and "Tenth" (directing the payment of the balance of such income and all of the income of the personalty to the children for their lives) the contention of the appellants that the court below erred in holding "that it is only after the administration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income" could not be resisted, for these clauses raise no question what the testator intended the trustees should receive and hold upon the trusts of the will. "I do give, devise and bequeath unto the trustees hereinafter named * * * all of the rest, residue and remainder of my estate not hereinbefore otherwise given, devised or bequeathed," the only other gift, devise and bequest—beside the allowance for the family payable by the executors pursuant to the "Fifth" clause of the will and the use of the residences ("Fourth" clause)—being the legacy to the widow ("Third" clause), which was finally paid on February 10, 1902. In other words, all of the property of the testator is given to the trustees except what was necessary to pay, or subject to the payment of, his debts, funeral expenses and the legacy to the widow.

> "By law the whole of an estate vests in the heirs testate or *ab intestato* at the death of a person deceased. It passes from them *sub modo* for the pur-

> pose of administration and the administration is required to be speedy so that the remainder, if any, may be returned to its real owners, the heirs."
>
> *Gossage v. Crown Point M. Co.*, 14 Nev., 148, 158.

In *Lovering v. Minot*, 9 Cush. (Mass.), 151, the court held in the case of a gift of the residue (which, of course, could not be ascertained until after the administration was finished) the income of which was to be paid to the devisees, that they were entitled to the income from the death of the testator.

Has the testator shown *when* the trusts of the will first come into operation by stating *what* the trustees are to receive and hold in trust?

What the court below has decided is that the trustees must hold in trust as corpus not merely all of the rest, residue and remainder of the estate not "otherwise given, devised or bequeathed," but also three and a half years' accumulated income at the very least. But for clause "Eighth" it could have been contended without opposition that what the will states the trustees are to hold in trust is not what is distributed to them, but all of the rest, residue and remainder of the estate not otherwise given, devised or bequeathed. Clause "Eighth" will be referred to later. Under the will the executors were also the trustees and therefore there was no actual transfer of the property. And it must be admitted that executors have not ordinarily any concern with the real property of the estate that they administer. There is no statute of the Territory of Hawaii giving executors any rights over real property of estates administered by them except the statute empowering the probate court to grant them a license to sell real estate in order to pay debts where there is not sufficient personal estate for that purpose.

But the will consists of other clauses than those mentioned and upon which reliance will probably be made in asking that the decree should be affirmed.

By the "First" clause the executors are directed to reduce to possession all and singular the estate, real, personal and mixed; and to manage, control, care for and collect the income and revenue thereof *pending the distribution thereof* as therein provided. These words confer on the executors the right to collect the income of the whole of the estate pending not the disposition but the distribution thereof, that is, of the estate. What, however, is expressly devised and bequeathed to the trustees is, as we have before remarked, not what is distributed but all of the residue of the estate, not otherwise given. It may be contended that the right given to the executors to receive the rents for a limited purpose—that is, for the payment of the debts and the widow's legacy—ceased when the purpose for which the right was given was accomplished or that they were merely the donees of a power to collect them—trustees for that purpose.

Conklin v. Egerton's Administrator, 21 Wend. (N. Y.), 430-436.

But the words of the will are clear that they were to collect the rents (as well as the rest of the income) pending the distribution of the estate.

The "Fifth" clause supports the view taken by the court below. Here a provision is made for the widow and children during or pending the administration. It consists of a family allowance *payable by the executors* with the approval of the court having jurisdiction of the *probate of the will*.

The first sentence of the "Sixth" clause of the will is significant and the words are stated

> "Sixth. At and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered respectively SECOND and THIRD hereof, I will and direct that my executrix and executors shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate."

The testator evidently thought that what would be distributed would be the residue of his estate. This is clear from a comparison of the "Sixth" and "Eighth" clauses of the will. What he assumed would happen was that the executors being in possession of the whole estate would pay the debts and the widow's legacy out of the cash on hand, investments paid in from time to time, and the income of the whole estate immediately and as it was received. And that immediately after the final payment was made to the widow on account of her legacy, the executors would file their accounts, and, no delay taking place in having them approved, the order of distribution would be made so that what would be distributed would be all the residue of his property. He did not allow for any hiatus between the final payment of the legacy and the order of distribution by the probate court. Unfortunately an interval did arise, of three years and five months, between the date of the final payment of the widow's legacy and the date of the order of discharge; and of two years and eleven months between the date of the filing of executors' "First and Final Account" with "Petition for order of distribution and discharge" and the date of the order of discharge.

It is certainly true that the direction in the first sentence of the "Sixth" clause merely states what it was the duty of the executors to do. The debts and legacy having been paid an order of distribution could not accomplish anything, could not transfer the estate to the trustees as it was already in their hands as executors.

The "Eighth" clause seems to aid the contention against the appellant. But an order of distribution does not extend to real property. Can it be said the real estate was distributed to the trustees? Yet here the distribution mentioned was certainly intended to include the real estate. This is clear from the words "other than that mentioned in the last preceding paragraph" (referring to his residences), and the direction to "collect all the rents" and "keep separate

and apart (during the life of his wife) the accounts of and pertaining to the realty of his estate," &c. And (clause "Ninth"), it is "from and out of the net income, rents, issues and profits of and from the realty *last aforesaid*," that is, from the realty distributed, that the trustees are required to pay one-third part thereof to his wife for life. There is no express direction to accumulate nor can one be implied from the words "to invest, reinvest and keep invested" any and all moneys that shall come into their hands by virtue hereof (clause "Eighth") because they are qualified by the words following "and which are not otherwise therein specifically bequeathed, assigned or appropriated."

In clause "Tenth," testator directs that the remainder of the income "from said realty" and "the net income and revenue of and from all my estate other than such realty which shall be under their (the trustees') control by virtue of this will," shall be given to his children for their lives. The words "from said realty" relate to "the realty last aforesaid" of the "Ninth" clause, while the words "my estate" seem to refer to the words of clause "Sixth."

It is to be observed that while the will shows the expectancy of a delay in concluding the administration, it was only the delay that the payment of the wife's legacy would necessitate, not that occasioned by or incidental to the filing of accounts and the executors obtaining their discharge.

It is clear that testator provided for, because he contemplated, no interval between the payment of the legacy to his widow and the time when the duties of the trustees would come into operation; and if the probate proceedings had been concluded "as soon as may be" after the payment of debts and the legacy to the widow, the interval could not have exceeded a few weeks.

Is not this what ought to have been done and as equity looks upon that as done which ought to be done, should not the court hold that the administration closed when its purpose was accomplished?

The application of this maxim in a similar case is considered in

Sitwell v. Bernard, 6 Ves. Jr., 520-534.

There Lord Eldon attempted to lay down the rule that the proper date to fix in such cases would be at the end of the period allowed by law to executors to administer,—in England twelve months: in the Territory of Hawaii, six months, section 1854 of the Revised Laws of Hawaii 1905 providing:

> "Executors and administrators shall in no case be liable to suit until the expiration of six calendar months after probate, or the granting of letters of administration, except in cases of rejected claims as provided in section 1853."

But the more liberal rule in favor of beneficiaries laid down by Lord Thurlow referred to in that case is the one now in force both in the United States and in England.

Lovering v. Minot, 9 Cush. (Mass.), 151.

And finally the court must determine whether it would be safe so to construe a will that rights under it can be held to depend on a date which the testator not only did not contemplate, but which is so uncertain and that could be so easily postponed as that of the date of an order of distribution.

Respectfully submitted,

W. L. Stanley,
Henry Holmes,
C. H. Olson,
For Trustees under the Will and of the Estate of James Campbell, Deceased.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 107.

ABIGAIL K. CAMPBELL PARKER, APPELLANT,

vs.

ABIGAIL K. CAMPBELL PARKER, ALBERT N. CAMPBELL, AND CECIL BROWN, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Brief for Cecil Brown, Heinrich M. Von Holt, and Albert N. Campbell (the said Heinrich M. Von Holt and Albert N. Campbell Substituted for Abigail K. Campbell Parker and Joseph O. Carter, Both Deceased), Trustees under the Will and of the Estate of James Campbell, Deceased.

The above-entitled cause comes to this court on appeal from a decision of the Supreme Court of the Territory of Hawaii.

In August, 1905, a suit was instituted by the trustees under the will and of the estate of James Campbell, late of Hono-

lulu, deceased (then Abigail K. Campbell Parker, Joseph O. Carter, and Cecil Brown), in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, to obtain a construction of the will of the said James Campbell.

Question 7 in this bill for construction was:

> "7. Are the widow and children entitled to any share of the net income provided for in the ninth and tenth clauses of the will pending the closing of administration?"

and the answer of the Supreme Court to the question was:

> "It is only after the administration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income; and it is only from that time that the accounts are to be kept separate and the income apportioned."

On the 6th day of March, 1907, the plaintiffs filed a new bill for construction, to which the guardians *ad litem* of Kawananakoa minors and of Alice E. K. Macfarlane demurred. These demurrers were sustained by the third judge of the First Circuit Court. Against the decree filed in pursuance of this decision the plaintiffs appealed to the Supreme Court of the Territory, which affirmed the decree, and it is against this decision that the widow (now the trustees of her will) appealed to this court.

The question that the trustees asked in their new bill was: When was the administration closed and the estate distributed to the trustees?

What is concerned is the disposition of the income of the estate between February 10, 1902, when "the obligations and bequests contemplated in paragraphs second and third" of the will were paid and discharged, and July 3, 1905, when the executors obtained an order of distribution. Is this income to be accumulated and added to the corpus, or is it

owned by the widow and children of deceased upon the terms of the will?

The first paragraph of the will directed the executors "to reduce to possession all and singular my estate real personal and mixed wheresoever situated; and to manage, control, care for and collect the income and revenue thereof pending the distribution thereof as hereinafter provided."

The second paragraph directs the executors to pay debts and funeral expenses.

By the third paragraph testator gives to his wife a sum of money equal to one-third of the sums which, in accordance with paragraph No. 1, should be decreed to be the value of the personal property only after payment of debts and funeral expenses, payment, in cash, to be made as rapidly as the income and interests of the estate shall permit, without the sale of any real estate or the sacrifice of any personal property as a means of raising such sum, but provided that the entire sum should be paid within two years from the date of testator's death (which occurred on the 21st day of April, 1900); no deferred payments to bear any interest.

The sixth paragraph is as follows:

> "Sixth. At and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered respectively SECOND and THIRD hereof, I will and direct that my executrix and executors shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate. And I do give, devise and bequeath unto the trustees hereafter named, and to those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest, residue and remainder of my estate, not hereinbefore otherwise given, devised or bequeathed. To have and to hold unto said trustees, their respective heirs, executors, administrators, assigns and successors in trust hereunder, forever. But in trust, nevertheless, for the uses and purposes hereinafter expressed and set forth, that is to say." R., 9.

The eighth paragraph directs that:

With respect to all property which shall be so distributed to them (other than the residences) the trustees are

(1) To reduce it to possession;

(2) To manage, control, preserve and direct it;

(3) To pay all costs and charges thereof;

(4) To collect all the rents, issues, profits, income and revenue thereof;

(5) To collect and realize upon all credits and securities at such times, etc., and to invest and reinvest and keep invested and at will to change the investments of any and all money that shall come to their hands by virtue thereof and which are not therein specifically bequeathed, assigned or appropriated;

(6) To segregate (during the life of the widow) the accounts of and pertaining to the realty of my estate from the accounts pertaining to any and all other thereof.

Paragraph ninth is as follows:

> "Ninth. And from and out of the net income, "rents, issues and profits of and from the realty last "aforesaid, said trustees shall pay the equal one-third "part or portion thereof, in semi-annual or (at the "discretion of said trustees) more frequent payments, "to my said wife, for and during the remainder of "her natural life. To have and to hold the amounts "herein provided so to be paid, as and for her abso-"lute and separate property, unto my said wife, her "executors, administrators and assigns forever."
>
> R., 10.

"The realty last aforesaid" is "the realty of my estate" of paragraph eighth.

The following dates are important:

April	30, 1900.	Testator died;
June	26, 1900.	Will proved;
January	1, 1901.	Abigail W. Kawananakoa, daughter of deceased, attained her majority;

February	10, 1902.	"Full payment of obligations and bequests contemplated in paragraphs second and third of will;"
August	25, 1902.	Filing of executors' "first and final account" and "petition for order of distribution and discharge;"
March	17, 1903.	Alice K. Macfarlane, daughter of deceased, attained her majority;
July	3, 1905.	Order of distribution and discharge;
July	28, 1905.	Receipt of trustees to executors and therefore the discharge of the latter.

The first ground of demurrer in that filed by the guardian *ad litem* of the Kawananakoa minors is (R., 24):

> "That said bill of complaint does not contain any matter of equity whereon this court can ground any decree, or give to the complainant the relief prayed for therein, or any relief, in that it affirmatively appears from said bill that the administration of the estate of James Campbell, deceased, actually closed and said estate was distributed to the trustees on the 28th day of July, 1905."

The corresponding ground of demurrer in that filed by the guardian *ad litem* of Alice E. K. Macfarlane is as follows (R., 23):

> "2. That it appears in and from the allegations in said bill of complaint that none of the respondents herein are entitled to any share in the income from the estate of James Campbell, deceased, save from and after the 28th day of July, A. D. 1905, that said income only began to accrue on said date and that the administration of said estate was not closed nor was the same distributed to the trustees until said date, and that no property vested in said trustees until said date, and that hence no doubt or uncertainty can exist as to the true construction of the will of James Campbell, deceased, in regard to those matters as to which relief is prayed."

July 28, 1905, is the date when the executors filed the receipt of the trustees for the estate.

The will states *what* the trustees should receive and hold upon the trusts of the will: "I do give, devise and bequeath unto the trustees * * * all the rest, residue and remainder of my estate not hereinbefore otherwise given, devised or bequeathed," the only other gift, devise or bequest being a legacy to his wife, which was paid on the tenth day of February, 1902, all the debts and funeral expenses having been paid before that date. In other words, all the property of the testator is given to the trustees except what is necessary to pay, or subject only to the payment of, his debts, funeral expenses, and the legacy to his widow.

> "By law, the whole of an estate vests in the heirs testate or *ab intestato* at the death of a person deceased. It passes from them *sub modo* for the purpose of administration and the administration is required to be speedy so that the remainder, if any, may be returned to its real owners, the heirs."
>
> *Gossage v. Crown Point M. Co.*, 14 Nev., 148, 158.

As showing to what extent courts will go to prevent the rights of the beneficiaries from being defeated by administration, the case of—

> *Lovering v. Minot*, 9 Cush. (Mass.), 151,

is cited. There a gift of residue (which could not be ascertained until after administration was finished) to pay income to devisees was held to entitle them to income from the death of testator.

Has the testator here shown *when* the trusts of the will come into operation by stating explicitly *what* the trustees are to receive and hold on trust?

What was in issue on this question in the first suit for construction was, chiefly, whether the right to the income related back to the date of testator's death in the case of the

widow at least, and to their respective majorities in the cases of Princess Kawananakoa and Mrs. Walter Macfarlane.

It should be assumed that this suit for construction of a will was instituted in good faith by the trustees. They at least recognized that the close of administration might mean one of two things, viz., the completion of the duties for which the office of executor was created, or the filing of the executor's first and final accounts on the one hand, and the date of the order of discharge (July 3, 1905) or their discharge as such executors (July 28, 1905) on the other hand, and that the distribution to the trustees might likewise mean one of two things (remembering they were executors), viz., either the time when they, as executors, had no reason for holding possession of any of the property, their duties as such being completed, or the date of the order of distribution. There could be no actual distribution to them as trustees of what they already held. The object of keeping the duties of the two offices of executors and trustees separate and apart is not to frustrate the intention of testators or to change the rights of the beneficiaries.

Having this doubt they asked the court to decide the question for them.

It is certainly significant that while by the demurrers the date of the closing of the administration is given as July 28, 1905, the Supreme Court of the Territory by its decision fixed the date as the 3d day of July, 1905, the date of the order of discharge.

The first sentence of paragraph sixth of the will is merely a direction to the executors to do what it was their duty to do as executors if no such direction were given.

> "After all the debts of, and charges against, the estate have been paid it is the duty of the executor or administrator to pay or deliver the legacies given by the will."
>
> 11 *Am. & Eng. Ency. of Law* (2d Ed.), 1160.

The legacy of the widow was paid without any order of distribution, and this under the terms of the will. It is clear that any order of distribution could not accomplish anything so far as the estate itself was concerned. Its physical possession was already in the trustees. The purpose of the order of distribution is, and could only be in this case, to protect the executors. Executors distribute at their peril without an order of distribution, but there is neither law nor reason to prevent them doing so. It is not, referring to the words of the will, what is "distributed" to the trustees that by the will is devised to them upon trust, but all the rest, residue, and remainder of his estate not otherwise given, devised, or bequeathed, so that the title of the trustees attached to all the property certainly not later than the date of the payment of the legacy to the widow.

The second ground of the demurrer filed by the guardian *ad litem* of the Kawananakoa minors is as follows (R., 25):

> "2. That it appears from the allegations in said bill of complaint contained that the matters and things sought thereby to be submitted to this court for its present consideration and determination are *res adjudicata*."

The corresponding ground of demurrer in that filed by the guardian *ad litem* of Alice E. K. Macfarlane is as follows (R., 23):

> "1. That it appears in and from the allegations in said bill of complaint that the matters on which the complainants seek instructions are *res adjudicata*."

The court decided that only after

(1) The administration is closed and

(2) The estate is distributed to the trustees the widow and children begin to share in the income.

The court had not adjudicated the exact date when the administration closed or when the estate was distributed to the trustees. This it was necessary to do for the purpose of

determining whether or not the widow and children are entitled to any of the income of the estate that accrued prior to the date of the executors' discharge.

The contention on behalf of the grandchildren as appears by the demurrers is that the administration did not close and the estate was not distributed until the 28th day of July, 1905, the date when the trustees filed their receipt for the estate.

The court had not said in its decision in the first case that the administration closed when the executors were discharged, viz., July 28, 1905, nor yet when the order of distribution was made, viz., July 3, 1905. The demurrer claimed the former was the right date. Yet the Supreme Court of the Territory decided that it was the latter (R., 32). Could the case be *res adjudicata* if there was room for speculating on the decision when the administration closed?

Did not the right to receive the rents given to the executors, given for a limited purpose, that is, for the payment of debts and the legacy to the widow, cease when the purpose for which such right was given was accomplished, if they were not trustees of those rents, which seems the right view to take of their capacity so far as such rents are concerned.

Power was given to the executors to collect rents but it was as donees of that power and not in the capacity of executors that they could collect rents.

> *Conklin v. Egerton's Administration*, 21 Wend. (N. Y.), 430, 436.

The point *when* the administration closed and *when* the estate was distributed was not directly tried and is a collateral matter that is attempted to be collected or inferred from the decision.

The following questions cannot be said to be the same:

Is a beneficiary entitled to income pending administration?

When did the administration close?

The latter question deals with a different ultimate matter from the former, although we admit it might have been raised and adjudicated under the pleadings if the parties and the court had seen fit to raise and decide it, to paraphrase the words of the decision of the court in—

Hawn. Com. & Sug. Co. v. Wailuku Sug. Co., 14 Haw., 50, at p. 55.

There is no estoppel where the inferences from a judgment are merely possible or probable, and not those that are necessary.

Ibid.

The third ground of demurrer filed on behalf of the Kawananakoa minors is as follows:

> "2. That this court is without jurisdiction to grant the relief prayed for in said bill of complaint or any relief" (R., 25).

The right of a trustee to resort to a court of equity for instructions is well established. The right is not exhausted if the trustees once resort to the court.

We admit the right to the advice is limited, but the limitation includes questions of doubt and of conflicting claims. Conflicting claims arise in this case.

The fourth ground of the demurrer filed by the guardian *ad litem* of the Kawananakoa minors is as follows (R., 25):

> "4. That this court of equity, in the absence of a showing of fraud, mistake or accident, is without jurisdiction to alter, amend, or in anywise interfere with the force and effect of that certain decree of distribution heretofore, to wit, on the 3rd day of July, 1905, made and entered by the second judge of this court, sitting at chambers in probate, in that certain proceeding then properly before him entitled 'In the matter of the estate of James Campbell, deceased,'—for the purpose of fixing the rights of cer-

> tain of the parties hereto to share in the income of said estate, or for any other purpose."

The third ground of demurrer filed by the guardian *ad litem* of Alice E. K. Macfarlane is as follows (R., 23):

> "3. That this honorable court sitting as a court of equity has no power in the absence of fraud or mistake to modify or amend the decree of July 3rd, A. D. 1905, discharging the executrix and executors mentioned in said bill and directing them to distribute the estate to the trustees therein named, that therefore the administration cannot be deemed to have closed nor the estate to have vested in the trustees before that date and that hence no legal doubt can exist as to when said events shall be deemed to have taken place and no cause of suit is stated in and by said bill of complaint."

The court is not asked to alter, amend or in anywise interfere with the force and effect of the decree of distribution on the third day of July, 1905, made and entered as mentioned in the first of the two grounds of demurrer under consideration. Are not the rights of the parties entitled to benefit under a will independent of all matters of administration? Can rights be changed by selecting a date so likely to fluctuate as the date of an order of distribution? The testator gave all the rest, residue and remainder of his property, after payment of his debts and a legacy, to his trustees upon certain trusts. What that property was can be ascertained at any time, and the possession of any portion of that property by the executors cannot change (1) what it was that the trustees were entitled to receive, and (2) what it was that they are to hold in trust for the uses and purposes mentioned in the will.

It is clear that the testator provided for, because he contemplated, no interval between the payment of the legacy to his widow and the time when the duties of the trustees would come into operation; and if the probate proceedings had

been concluded "as soon as may be" after the payment of debts and the legacy to the widow, the interval could not have exceeded a few weeks.

Is not this what ought to have been done, and as equity looks upon that as done which ought to be done, should not the court hold that this administration closed when its purpose was accomplished?

The application of this maxim in a similar case is considered in—

Situell v. Bernard, 6 Ves. Jr., 520-534.

There Lord Eldon attempted to lay down the rule that the proper date to fix in such cases would be at the end of the period allowed by law to executors to administer—in England twelve months; in the Territory of Hawaii six months, section 1854 of the Revised Laws of Hawaii, 1905, providing:

> "Executors and administrators shall in no case be liable to suit until the expiration of six calendar months after probate, or the granting of letters of administration, except in cases of rejected claims as provided in section 185a."

But the more liberal rule in favor of beneficiaries laid down by Lord Thurlow, referred to in that case, is the one now in force both in the United States and in England.

Lovering v. Minot, 9 Cush. (Mass.), 151.

To meet the contention that will probably be made that the accumulation of income was foreseen by the testator when he provided by clause "Eighth" of his will that the trustees should "invest and reinvest and keep invested * * * any and all moneys that shall come to their hands by virtue hereof" (which probably refers to the will and not the order of distribution by reason of the words following "and which are not herein specifically bequeathed, assigned, or appro-

priated"), it is only necessary to point out that the collection of an investment of an amount in excess of the balance of the legacy unpaid at the time of the collection would necessitate an investment of such excess.

The case of the guardian *ad litem* of Abigail Helen Kawananakoa, a minor; David Kalakana Kawananakoa, a minor, and Lydia Liliuokalani Kawananakoa, a minor, was so ably presented in the court below that we have thought it advisable to leave the opposite view to that presented here in the same hands in this case.

Respectfully submitted,

W. L. STANLEY,
HENRY HOLMES,
C. H. OLSON,
Attorneys for Trustees under the Will and of the Estate of James Campbell, Deceased.

15

Office Supreme Court, U. S.
FILED.
JAN 22 1910
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

Nos. 106 and 107.

HAWAIIAN TRUST COMPANY, LTD., ET AL., EXECUTORS OF ABIGAIL K. CAMPBELL PARKER, DECEASED, APPELLANTS,

vs.

HEINRICH MARTENS VON HOLT, ALBERT N. CAMPBELL, AND CECIL BROWN, TRUSTEES, ET AL.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLEES, KAWANANAKOA MINORS.

E. M. WATSON,
Attorney and Guardian ad Litem for Appellees, Kawananakoa Minors.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

Nos. 106 and 107.

HAWAIIAN TRUST COMPANY, LTD., ET AL., EXECUTORS OF ABIGAIL K. CAMPBELL PARKER, DECEASED, APPELLANTS,

vs.

HEINRICH MARTENS VON HOLT, ALBERT N. CAMPBELL, AND CECIL BROWN, TRUSTEES, ET AL.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLEES, KAWANANAKOA MINORS, BY E. M. WATSON, THEIR GUARDIAN AD LITEM.

Statement.

These causes come up on appeal from the Supreme Court of Hawaii. Inasmuch as both suits relate to the construction of the will of one James Campbell, late of Hawaii, the parties to such proceeding being the same, and the facts involved closely related, we have thought it desirable for the convenience of the court to discuss the appeals in one brief.

The original appellant here in each case, Abigail K. Camp-

bell Parker, widow of the testator, Campbell, has died since the docketing of the causes in this court, and her representatives have been duly substituted. Heinrich Martens von Holt, her successor as trustee under the will of said Campbell, deceased, and Albert N. Campbell, successor as trustee to Joseph O. Carter, another of the original appellees herein, who, since the docketing of said causes, has departed this life, have also been substituted herein as appellees.

Case No. 106.

This suit was instituted in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii by the then trustees under the will and of the estate of James Campbell, late of Honolulu, for the purpose of having said decedent's will construed and obtaining the direction of the court as to the manner in which the trusts declared in said will should be carried into execution.

An abstract of the will filed by complainants, in so far as the same may be necessary to a proper understanding of the pending appeal, is as follows:

> "*Paragraph 1.* James Campbell died April 21, 1900, seized and possessed of real and personal estate, situate in Hawaii and elsewhere.
>
> "He left a last will, duly executed and published on July 8, 1896, in which complainants are named executrix and executors and trustees.
>
> "(A copy of this will is annexed to the bill as Exhibit A.)
>
> "2. On June 26, 1900, this will was duly admitted to probate in the First Circuit, the appointment of complainants as executrix and executors confirmed, and letters testamentary duly issued to complainants.
>
> "3. Complainants, as executrix and executors, have paid all claims against the estate;
>
> "And all legacies provided by said will;
>
> "Duly rendered their administration accounts of all their proceedings in the settlement of the estate;
>
> "Had these accounts examined and approved.
>
> "On July 3, 1905, complainants were discharged

as such executrix and executors, and directed to distribute, and have distributed, to themselves, 'as residuary devisees and legatees in trust,' the residue of the property of the estate.

"4. The deceased left him surviving:

"*A widow, Abigail K. Campbell*, who thereafter married Samuel Parker; and who, under the name of Abigail K. Campbell Parker, is both complainant and respondent herein.

"Heirs-at-law and next of kin, four daughters:

"Abigail W. Kawananakoa, formerly Abigail W. Campbell, now wife of David Kawananakoa.

"*Alice K. Macfarlane*, formerly Alice K. Campbell, now wife of Walter Macfarlane.

"*Muriel K. Campbell.*

"*Beatrice U. Campbell*, described in the will as Mary Campbell.

"All of these reside in Honolulu and are named as respondents herein.

"Abigail W. Kawananakoa attained her legal majority on January 1, 1900.

"Alice K. Macfarlane attained her legal majority on March 17, 1903.

"Muriel K. Campbell is a minor, and of the age of 14 years.

"Beatrice U. (Mary) Campbell is a minor, and of the age of 10 years.

"5. Since the death of deceased, three children have been born to Abigail W. Kawananakoa, to wit:

"Abigail Helen Kapiolani Kawananakoa, daughter, born March 14, 1903.

"David Kalakaua Kawananakoa, son, born March 10, 1904.

"—— Kawananakoa, daughter, born July 22, 1905.

"This last child not yet christened at date of filing of petition.

"All of these children are named as respondents herein.

"6. Respondents are, each and all, legatees and devisees under the will.

"7. Real property of estate is of the value of about $900,000.



Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 4

"Annual rentals from real property about $80,000.

"Personal property of estate is of the value of about $700,000.

"Annual income from personal property about $40,000.

"8. The eighth clause of the will provides that complainants shall segregate, keep separate and apart the accounts of and pertaining to the realty of the estate from the accounts pertaining to any and all other property of the said estate."

Complainants then allege that doubts have arisen in their minds as to the true construction of certain of the provisions and trusts contained in the said will, and, among other questions submitted in and by said bill (this being the only one with which this appeal is concerned), is the following:

"That the complainants are also uncertain whether under the provisions of the ninth clause of the said will the respondent Abigail K. Campbell Parker is entitled to any share of the income of the realty of the estate, pending the close of the administration and whether under the provisions of said tenth clause of the said will, the children of the testator are entitled to any share of the income of the estate pending the closing of the administration of the estate by the executrix and executors" (R., 6).

These respondents, the Kawananakoa minors, grandchildren of the testator and remaindermen under the terms of his will, by their guardian *ad litem*, duly filed their answer to said bill, admitting generally the facts therein alleged, and submitting their entire rights and interests to the protection of the court (R., 19, 22).

The answers of the other respondents were duly filed, in which various contentions were advanced, and upon a hearing on the pleadings and proof the court made and entered its decree, in part as follows:

"(7) That Abigail K. Campbell Parker is not entitled under the ninth clause of the said will to any

share of the income of the realty of the estate pending the closing of the administration of the estate.

"(8) That none of the children of the testator are entitled to any share of the income of the estate pending the closing of the administration of the estate" (R., 142).

From the entire decree of the Circuit Court all of the respondents noted and perfected their appeals to the Supreme Court of Hawaii, the original appellant herein, Abigail K. Campbell Parker, taking her separate appeal (R., 143), and these respondents, the Kawananakoa minors, by their guardian *ad litem*, duly appointed and acting, taking their joint appeal to said Supreme Court of Hawaii (R., 143, 144).

Touching the one point involved in this appeal, the Supreme Court of Hawaii rendered its opinion as follows:

"Are the widow and children entitled to any share of the net income provided for in the ninth and tenth clauses of the will pending the closing of administration?

"We have no hesitation in answering this question in the negative. It is only after the administration is closed and the estate is distributed to the trustees that either the widow or any of the children begin to share in the income and it is only from that time that the accounts are to be kept separate and the income apportioned" (R., 156-57).

The decree entered in that behalf was that "the decree appealed from is affirmed except as to questions 2, 4, and 6, and as to those questions it is reversed" (R., 163),—the point presented by this appeal being thereby finally adjudicated and determined.

Thereafter a petition for rehearing was presented by Abigail W. Kawananakoa, one of the respondents (the mother of these minors), wherein, among other grounds urged, appears the following:

"That said decision on said point is open to two constructions; one, that although 'the widow and chil-

> dren are not entitled to any share of the net income provided for in the ninth and tenth clauses of the will pending the closing of the administration,' yet they are entitled to the payment of all income after close of administration, whether such income accrued before or after the closing of such administration; and the other, that the widow and children, under said clauses, are only entitled to income which accrued after the closing of administration and not to income earned and paid to said trustees covering the period between the death of the testator and the closing of administration. * * *
>
> "Intimately connected with this point is the question 'When did the trustees take hold of said estate and become, for any purpose, authorized to act concerning any of the provisions of the will?' Was it (*a*), at the date of the death of the testator, April 21, 1900; (*b*), at the date when the legacy to the widow (of one-third the value of the personal property) was finally paid, February 10, 1902; (*c*), at the date of the filing of the final accounts and petition for discharge by the executors, August 25, 1902; (*d*), at the date when the decree of distribution was signed by the Circuit Judge, July 3rd, 1905; or, (*e*), was it at such time when the administration should have been, but was not in fact, closed, owing to the delays of obtaining hearings, awaiting decisions approving such accounts, remodeling and filing new accounts to conform to such decisions, and other delays for which this respondent is not responsible" (R., 159).

This petition for a rehearing was denied, the court saying:

> "This matter was fully argued in the briefs, all the arguments were considered by the court, and no portion of the will was overlooked. The court decided and intended to decide that the widow and children are not entitled at any time to any share of the net income referred to in the ninth and tenth clauses of the will pending the closing of administration. A re-examination of the matter strengthens that view" (R., 162).

And an appeal was thereupon taken by the widow, Mrs. Abigail K. Campbell Parker, from the decision and decree of said Supreme Court of Hawaii to this court, upon the single point hereinabove set out, which appeal was duly allowed as prayed for (R., 163, 164).

Case No. 107.

After the denial of the petition for a rehearing in Case No. 106 (*supra*), the trustees, claiming to be still in doubt as to when the administration of the estate of the said James Campbell closed and when said estate vested in them as such trustees, for the purpose of determining the rights of the various parties in interest, filed in said First Circuit Court of Hawaii their second bill against all the beneficiaries under the will, alleging practically the same facts appearing in their first bill, the filing of such first bill by them, and the decision and the decree of the Supreme Court of Hawaii with respect to the point pending on appeal in Case No. 106, and in addition thereto, in paragraphs 14 and 17 of said bill, as follows:

"XIV.

"That the said executrix and executors paid all of the debts of the said deceased at the time of his death and funeral and testamentary expenses long prior to the tenth day of February, A. D. 1902; and on the 10th day of February, A. D. 1902, said executrix and executors paid to the said Abigail K. Campbell Parker, as the widow of said deceased, the final balance of the aforesaid legacy of a sum of money equal to a one-third proportion of the value of the personal property only of said deceased, which personal property was on the 21st day of September, A. D. 1900, decreed to be of the value of $1,073,325.74; and that with such last mentioned payment, no act of the administration proper of the said estate of said deceased remained unperformed; and in this behalf, these complainants further show, that during all the times herein mentioned, prior to the tenth day of February,

A. D. 1902, the condition, income and interests of the estate of said deceased, were such as to warrant and permit, and did in fact warrant and permit, without the sale of any real estate or the sacrifice of any personal property as a means of raising said legacy or said balance thereof, the payment of said final balance of said legacy to said surviving widow by the said 10th day of February, A. D. 1902 (R., 5, 6).

"XVII.

"That doubts have arisen in the minds of the complainants as to the true construction of paragraphs ninth and tenth of the said will and particularly whether or not the administration of the said estate closed and the said estate vested in these complainants as such trustees as aforesaid, or, for the purpose of determining the rights of the said A. K. Campbell Parker, Abigail Kawananakoa and Alice Macfarlane to such income, the said administration shall be deemed to be vested in these complainants as such trustees as aforesaid, 'at and upon the full payment and discharge of the obligations and bequests contemplated in paragraphs numbered second and third' of the said will, that is to say, on the 10th day of February, 1902, or on the filing by the complainants of their first and final account as such executrix and executors, and of their petition for the allowance of such accounts and for an order to deliver such of the property of the estate as remained in their possession to the persons entitled thereto and discharging them from all further responsibility as such executrix and executors as aforesaid, to wit, the 25th day of August, 1902, or at any other date prior to the 28th day of July, 1905, which date it is necessary to determine for the purpose of ascertaining the date from which the said A. K. Campbell Parker is entitled to one-third of the income from the said real property and the said Abigail Kawananakoa and Alice Macfarlane are entitled to a share of the income from the said real and personal property; and that conflicting claims are being made by and on behalf of said respondents in this regard" (R., 6).

These respondents, the Kawananakoa minors, by their guardian *ad litem*, demurred to said bill on the grounds, in substance, (1) that the matters under which advice is sought by the trustees have all been decided and are *res adjudicata*, and, if not, (2) want of equity, in that it appears from the bill when the administration closed and the estate was distributed to the trustees (R., 24, 25).

The guardian *ad litem* for Alice E. K. Macfarlane, another minor respondent, also demurred to said bill on practically the same grounds (R., 23, 24). None of the other respondents, including the original appellant herein, Abigail K. Campbell Parker, filed any answers or pleadings of any kind to said bill, nor, so far as the record shows, did any one of them enter an appearance in said cause for any purpose whatsoever. The demurrers interposed to the bill by the guardian *ad litem* of the minors (grandchildren) were sustained, and the bill dismissed (R., 26), and from this decree the complainants (trustees) appealed to the Supreme Court of Hawaii, and by said Supreme Court the decree of the Circuit Court sustaining the demurrers was affirmed (R., 33).

It will be noted that no appeal was taken by the widow, the original appellant herein, from the decree of the Circuit Court, but the pending appeal was taken by her from the decree of the Supreme Court of Hawaii affirming the decree of the circuit judge of the first circuit, and in such pending appeal the representatives of said widow (as stated *supra*) have been substituted since her death as appellants.

There is no dispute between the parties as to the amount in controversy, nor as to the widow's separate interest in the fund involved in each case being far in excess of the required jurisdictional value here.

Assignments of Errors in Cases Nos. 106 and 107.

The assignment of errors in the first case (No. 106) raises the sole question as to the correctness of the holding of the Supreme Court of Hawaii that neither the widow nor the children of the testator are entitled to any share of the net income referred to in the ninth and tenth clauses of the will pending the closing of the administration of the estate and the entering of the order directing distribution to the trustees (No. 106, R., 166).

In the second case (No. 107) the correctness of the decree of the Supreme Court of Hawaii affirming the decree of the circuit judge of the Circuit Court of the First Circuit dismissing complainant's bill of complaint, is, in substance, the only question sought to be reviewed. Assignment 3, we take it, will *not* be urged by counsel for appellants, as the record discloses that no such holding as that referred to in said assignment was or could have been made in the case, inasmuch as the only questions presented to that court at the time were those raised by demurrer (No. 107, R., 36, 37).

ARGUMENT.

The will of James Campbell, deceased, which is set out in full in the record of each case herein (No. 106, R., 7-13; No. 107, R., 8-13) is a lengthy document, comprising some twenty-two paragraphs or subdivisions, and it may be useful and convenient to present here an abstract of such portions of the will as are material on this appeal.

Such abstract follows:

> *Paragraph First.* The executrix and executors "are "directed
>
> (*a*) "To reduce to possession all and singular my "estate, real, personal and mixed, wheresoever situ-"ated;
>
> (*b*) "To manage, control, care for and collect the

"income and revenue thereof, pending the distri-
"bution thereof as hereinafter provided;

(*c*) "To catalogue, inventory and appraise the
"same;

(*d*) "To secure an adjudication, by the court of
"the Hawaiian Islands having jurisdiction of such
"matters, of the value thereof.

"As the interests of my wife, and of my children,
"concerning such valuation, may conflict, it is my
"will that each of said interests be fully repre-
"sented in the proceedings for the determination of
"the value of my estate."

Second. The executrix and executors are directed
"to pay and discharge all debts which shall be out-
"standing against me or my estate, including all
"expenses of my last illness and funeral."

Third. "To my wife—Abbie Campbell—I give,
"devise and bequeath a sum of money equal and
"equivalent to a one-third ($\frac{1}{3}$) proportion of the
"sum which, in accordance with paragraph num-
"bered First hereof, shall be finally decreed and
"determined to be the value of the Personal Prop-
"erty only, belonging and pertaining to my estate,
"at the date of such decree and determination, and
"after the payment and discharge, or provision for
"the payment and discharge, of all obligations con-
"templated by paragraph numbered Second hereof."

"Such sum shall be paid in cash.

"If the condition and interests of my estate shall
"not warrant the payment of the entire sum hereby
"contemplated, at one time, then my executrix and
"executors shall pay the same as rapidly as the in-
"come and interests of my estate shall permit, with-
"out the sale of any real estate, or the sacrifice of
"any personal property, as a means of raising said
"sum.

"But provided, that the entire sum shall be paid
"within Two years from the date of my decease,
"and no deferred payments shall, within said pe-
"riod of two years, draw any interest.

"The said sum to be and become the absolute
"separate property of my said wife, to have and
"to hold unto her, her executors, administrators and
"assigns forever."

Fourth. During the life of the wife, the wife and

children, Abbie, Alice, Muriel and Mary, "together "with any other child or children that shall be born "to us," shall enjoy the Emma St. and Leahi houses as family residences.

Each child shall enjoy this right of residence while sole, "and no longer;" "and this, irrespective "of whether my said wife be then living or not."

Executors, and trustees as well, shall suitably "maintain these residences, at the charge of the "estate, during life of wife, "and thereafter while "*all* of my then living children shall be entitled to "reside therein."

"But when any child by contracting marriage, "shall lose such right of residence, then and there- "after (my wife being dead) the expense of such "maintenance and repairs shall be borne by those "of my children who shall be entitled to occupy "said premises hereunder."

Fifth. "I direct that my executrix and executors "do pay to my said wife, for the use of herself and "our children, as a family allowance, such sum, "monthly as may from time to time be approved "and decreed by the court having jurisdiction of "the probate of this will.

"And the trustees herein provided for, *from and "after their entry upon their functions of trust here- "under*, shall make such further provision for the "maintenance of said children as is hereinafter di- "rected."

Sixth. Upon satisfaction of the obligations contemplated by paragraphs second and third, *supra*, the executrix and executors are directed to conclude, as soon as may be, the probate proceedings hereunder, "and obtain a decree of distribution of my estate."

"And I do give, devise and bequeath unto the "Trustees hereinafter named, and to those of them "who shall be living and resident within the Ha- "waiian Islands at the date of such decree, all the "rest, residue and remainder of my estate, not here- "inbefore otherwise given, devised or bequeathed.

"To have and to hold unto said Trustees, their "respective heirs, executors, administrators, assigns "and successors in trust hereunder, forever.

"But in trust, nevertheless, for the use and pur-

"poses hereinafter expressed and set forth, that is "to say:"

Seventh. The residences mentioned in paragraph Fourth shall be occupied and maintained as provided in paragraph Fourth.

At the termination of the free use and occupancy as provided and limited in paragraph Fourth, said property, both real and personal, shall be partitioned by the then trustees among the then surviving children, and the lawful issue of any deceased child (taking by representation), in such manner and upon such terms and conditions as to payment of owelty and otherwise, as the parties entitled hereunder shall agree. But in case of a failure to agree within a reasonable time, the trustees shall secure a judicial decree partitioning the property.

The trustees shall carry into effect any partition, whether by agreement or judicial decree, by suitable deed or deeds of conveyance.

Eighth. With respect to all property distributed to them, other than the residences mentioned in paragraph Seventh, the trustees are directed:

(*a*) "To reduce it to possession.

(*b*) "To hold, manage, control, preserve and di- "rect it.

(*c*) "To pay all costs and charges thereof, in- "cluding their own commissions for such adminis- "tration.

(*d*) "To collect all rents, issues, profits, income, "and revenue thereof.

(*e*) "To collect and realize upon all credits and "securities, at such times and in such manner and "upon such terms as to them shall seem best.

(*f*) "To invest, and reinvest, and keep invested

(*g*) "At will, to change the investments of any "and all moneys that shall come to their hands by "virtue hereof, and which are not otherwise herein "specifically bequeathed, assigned or appropriated.

(*h*) "To segregate and keep, separate and apart "(during the life of my wife) the accounts of and "pertaining to the realty of my estate from the ac- "counts pertaining to any and all other thereof.

Ninth. "*And from and out of the net income, "rents, issues, and profits of and from the realty last*

"*aforesaid, said trustees shall pay the equal one-*
"*third part or portion thereof, in semi-annual or*
"*(at the discretion of said trustees) more frequent*
"*payments, to my said wife, for and during the re-*
"*mainder of her natural life.*

"To have and to hold the amounts herein provided
"so to be paid, as and for her absolute and separate
"property.—unto my said wife, her executors, ad-
"ministrators and assigns, forever."

Tenth. "And the remaining two-thirds of the net
"income rents, issues and profits of and from said
"realty during the natural life of my said wife, and,
"after her death, the entire net sum thereof, shall be
"by my said trustees included in one fund with the
"net income and revenue of and from all my estate
"other than such realty, which shall be under their
"control by virtue of this will,

"and such fund shall be by them at stated inter-
"vals of not more than six months, divided into as
"many equal parts as there shall then be *in esse*
"any of my children by my said wife,

"and shall be by said trustees paid to my said
"children, from and after their respective majority
"or marriage, share and share alike:

"Provided, that if any of my children shall de-
"cease, leaving lawful issue, such issue shall stand
"in the place or places of his, her or their parent or
"parents in all respects concerning the *division,*
"*payment* and receipt of the fund herein mentioned:

"And further provided that during the minority
"of said children respectively, and while they shall
"respectively remain unmarried, within such mi-
"nority, said trustees shall provide him, her or them
"being so minor and unmarried, with suitable *main-*
"*tenance and education*, and funds for foreign travel,
"in so far as the same shall be suitable and desirable
"to their means and condition; and all sums ex-
"pended under this provision shall be charged to
"*Family Maintenance*, and none of it shall be
"charged to said children, or any of them, indi-
"vidually

"And any surplus revenues arising or remaining
"under the provisions of this paragraph, shall be-

"come a part of the principal of my estate, and shall "be invested and reinvested as such.

"The sums expended for family maintenance here- "under shall not be reckoned as a part of such net "income as herein provided."

Twelfth. "It being my purpose herein to provide a "safe and certain income and maintenance for my "wife, our children and grandchildren, for, and dur- "ing the period of the trusts hereby established, I do "will and direct"

(*a*) That each female beneficiary shall receive and hold all moneys and other rights and privileges, free from the debts and control of any husband she may have after the date of the execution of this will.

(*b*) That the trustees, and their successors, "*shall "keep intact my estate,*" and administer the same under the name of "The Estate of James Campbell."

(*c*) That the realty thereof (except as herein provided in the case of the residence premises) "shall be "particularly and especially preserved intact, and "shall be aliened only in the event, and to the ex- "tent, that the obvious interests of my estate shall "so demand."

Sixteenth. "The provision herein made for my "wife is intended, and shall be by her accepted (if "at all), in lieu and full satisfaction of her dower "interest in my estate.

"The word 'issue' as used herein is intended to "mean, and signifies, all persons lawfully descended "from any of my said children as a common an- "cestor."

Those portions of the decision of the Circuit Court, sitting in probate, referred to by counsel for appellants on pages 13, 14, and 16 of their brief, where, in passing upon the accounts of the executors, the court attempts to construe the will of James Campbell, and presents elaborate argument to sustain such construction, are, we submit, at the most, *dicta*, pure and simple, and wholly without value. The jurisdiction of probate courts in Hawaii to construe wills is itself uncertain, but in the matter then before the circuit judge the question

as to the right of the widow to receive from the trustees any part of the net income of the realty accruing pending distribution to them was in nowise concerned. In passing upon the accounts the court held, and properly, that the *executors* were without authority to pay over to the widow any portion of the net income of the realty pending such distribution, but the question as to whether the trustees, upon distribution to them, should pay over such accrued income was not, and could not have been, before the court at that time and in that proceeding.

It was said by the Supreme Court of Hawaii subsequently, in passing upon an appeal from a decree of the Circuit Court in probate relating to certain items surcharged to these same executors upon their account:

> "The reasons that appellants give are that the order of distribution can be made without construing the will, and in order to pass on this item the will must be construed, which construction is a function of a court of equity and not of a court of probate; that the questions involved can only properly arise after the estate has been distributed, in this case the distributees being the executrix and executors to hold as trustees; and that the beneficiaries under the trusts created by the will would not be bound by such a construction in the present proceedings. To this, the contention, on behalf of Princess Kawananakoa, the appellee, is that the trial judge, sitting in probate, must necessarily have the power to construe the will wherever and to the extent necessary for the discharge of his duty in settling these accounts. *Without deciding that this contention of the appellee is correct, still, so far as it appears from the record, the accounts can be settled, a decree of distribution entered, and the executrix and executors discharged, without the necessity of construing the will at this time.* After the executrix and executors have accounted for all of the property of the decedent and have properly performed their duties, and consequently are entitled to be discharged, of what use is it to determine in advance questions that might or

> might not arise after the distributees, as trustees, have taken over the balance of the property? It is clear that the will need not be construed in order to determine to whom the executrix and executors should turn over the balance of the property remaining in their hands. It is also clear that the accounts can be passed on and settled without construing the will at this time" (R., 125).

In discussing the alleged errors assigned in case No. 106 (R., 166) we will confine ourselves, as far as possible, to the assignments and portions of assignments relating to the widow's separate interest.

It is, of course, true that "a party can appeal only from such portions of the decree as affect him" (Sage *v.* Central R. R. Co., 93 U. S., 412; 23 L. Ed., 912), and that "the parties who assign error will be treated as the only appellants or plaintiffs in error, and will not be heard to complain of errors which are only prejudicial to the parties who refuse to join in the assignments" (Millsaps *v.* Stanley, 50 Ala., 319); also, that "a decree cannot be reversed for error against a party who has not appealed" (S. P. R. R. Co. *v.* U. S., 168 U. S., 1; 42 L. Ed., 355), and therefore the children of the testator who did not join in this appeal can in nowise benefit thereby, but the interests of said children (if any) under the terms of the will to the fund in question are so closely allied and intermingled with those of the widow that, for the purpose of this discussion, it may be found necessary at times to refer to such interests together.

The widow, having elected to take under the will, is placed in the same position as the children (or any other legatee) with respect to the right to receive any share of the rents accruing from the realty pending distribution to the trustees, and the will should be construed as if she never had any dower right. No reason or authority can be furnished why the will should bear a different construction because the

widow waived her dower right and chose to come in under the terms of the will as a devisee or legatee. The court below was asked to decide, and this court is now to determine, what her rights were, not as widow, but as a devisee and legatee under the will. There is no question of sufficiency here; no question of abatement.

A.

There can be no doubt that a testator may provide for a legacy or annuity the payment of which is to be made or commence at a definite time in the future, and it is a well-settled general rule that where such a provision is found in a will the legatee or annuitant has no right or claim to the money before the specified time arrives.

18 Am. & Eng. Ency. Law, 792-795.

2 Roper on Legacies, 1245.

So far as the widow in this case is concerned, there can certainly be nothing to bring her within any exception to the rule, as she is well and liberally provided for by the testator under other clauses of the will (legacy, par. 3; "family allowance," par. 5).

We submit there is nothing in the will to support the contention that the right of the widow to a share of the income of the realty extends back to the date of the testator's death, and in fact the whole tenor of the instrument is, we claim, opposed to this view. There is no direction in the will to the *executor's* to pay anything to the widow except the legacy, paragraph 3, and the "family allowance," paragraph 5, and this "family allowance" is provided as a support, not only for the children, but also for the widow during the whole of the time that the estate is unsettled. The direction in paragraph 9 as to the share of the widow in the income from the realty, as well as that in paragraph 10 as to the shares of the children in the

ncome of the estate, is to the *trustees*, to whom the property devised at the conclusion of the administration. The will oes not provide that the *executors* shall pay any income entioned above to the widow or the children, yet clearly nder the terms of the will the executors have control of the ntire income during the administration proper. The testar directs (paragraph 1) the *executors* to reduce to possesn his entire estate, real, personal and mixed, and to collect e income "pending the distribution thereof as hereinafter rovided." They are then to pay debts (paragraph 2); the gacy to his wife (paragraph 3); the "family allowance" paragraph 5); and after payment of debts, etc. "to conclude e probate proceedings hereunder and obtain a decree of istribution" (paragraph 6). He then gives unto his *rustees* in said will named, "and to those of them who shall living and resident within the Hawaiian Islands at the te of such decree" all the rest, residue and remainder of is estate, not otherwise devised and bequeathed (paragraph), upon trust to keep the residences in repair (paragraph), to manage it, pay costs thereof, collect the revenue ereof, invest moneys on hand segregate income of realty om income of personalty (paragraph 8), at this time to low wife one-third of income of realty (paragraph 9), and, divide the balance of income into four parts and to pay to e children. In our opinion the "rest, residue and reainder" of the estate (after payment of debts, legacies, mily allowances, etc.), devised to the trustees under the rms of paragraph 6 of the will includes the *surplus income* cumulated during the course of the administration, and is surplus income on hand at the date of the taking over the trustees becomes and remains a part of the corpus of e estate, to be "invested and reinvested" as such (paraaph 8).

This authority to the trustees to invest money can only fer to such amount as is turned over by the personal reprentatives to themselves as trustees, and as the testator is

presumed to have known the condition of his estate, he must have realized that only in the event the surplus income accruing during the time the estate remained unsettled was to be turned over to the trustees and become part of the corpus of the estate would there be funds on hand for investment.

Our contention as to the proper construction of the will on the point here presented is also borne out by the latter portion of paragraph 9 of the will, from which it appears that from the time the trustees take over the estate, and *only from that time*, the accounts of and pertaining to the realty of the estate are to be kept separate and apart from the accounts pertaining to any and all others thereof. It is a significant fact that no direction to this effect is anywhere contained in the will with respect to the estate while it is in the hands of the *personal representatives*.

Referring again to the provision of paragraph 5 of the will ("family allowance") it is not reasonable to suppose that the testator intended that his widow should be paid the amount of the legacy bequeathed to her by paragraph 3 (one-third of the value of the personalty), furnished with support and maintenance during all of the time that the estate was in probate, and in addition to that be entitled to receive one-third of the accrued income from the realty dating from the time of his death. Taking into consideration the fact that the use of the residence houses, furniture, etc., is to be furnished to her free during her entire lifetime (paragraph 4), it will be seen that, should the opposite view from that which we are contending for obtain, she (the widow) would receive benefits from the estate largely in excess of what she would legally be entitled to as dower. That this was not contemplated by the testator is shown by paragraph 16 of the will, the language of which seems to indicate apprehension on the part of James Campbell that the widow might renounce under the will and claim the more liberal allowance provided by statute. ("The pro-

vision herein made for my wife is intended, and shall be by her accepted (if at all), in lieu and full satisfaction of her dower interest in my estate").

Then, under paragraph 9 of the will, what is it that is to be paid to the widow? We answer, "One-third of the net income rents, issues and profits of and from the realty last aforesaid"—that is, the realty turned over to the trustees, under the preceding sections of the will, the accounts of and pertaining to which have been kept separate and apart by them only from the date that they, as such trustees, received it. We submit that nowhere from the will can the intent of the testator be gathered that any income other than that which arose *from and after* distribution to the trustees is to be paid over.

As further evidence that this was clearly the intent of the testator, we refer the court to the method provided by the will (paragraph 9), for paying such income—"in semi-annual or (at the discretion of said trustees) more frequent payments." To hold that the first payment should include not only the income arising during the first six months of the trust, but also the accrued income from the time of the death of the testator, would not only render it impossible for the personal representatives to carry out the expressed wishes of the testator as to the payment of the legacy to the widow out of the income of the estate, but it would render obviously incompatible and inharmonious the declared purpose of the testator in paragraph 12 of the will "to provide a safe and certain income and maintenance for my wife, our children and grandchildren for and during the period of the trusts hereby established."

In discussing the very point which is now before this court on the pending appeal (that is, the right of the widow to share in the income accruing prior to the distribution to the trustees) upon the second bill brought for the construction of Mr. Campbell's will (Case 107), the Supreme Court of Hawaii has ably and learnedly summed up the provisions

of the will in that behalf and set out *in extenso* its views on the subject. This portion of the opinion of the Supreme Court of Hawaii (rendered in Case No. 107) while only *dicta* in the particular matter then before it (an appeal from the decree of judge of the Circuit Court sustaining demurrers to the second bill) is in its nature an amplification of the court's opinion rendered theretofore in this cause (No. 106, R., 156, 157), and is entitled, we submit, to careful consideration here.

The court says:

> "But, in view of all the circumstances, and of the apparent hardship upon three of the defendants, we will discuss the matter as though it never had been passed upon before.
>
> "The question is, from what date are the children and widow entitled to their proportions of the net income referred to in the ninth and tenth clauses of the will? The first paragraph of the will directs the executrix and executors 'to reduce to possession all and singular my estate, real, personal and mixed, wheresoever situated; and to manage, control, care for and collect the income and revenue thereof pending the distribution thereof,' as afterwards provided for. This clause would not admit of the possession and management by the trustees of the same property at the same time as that of the executrix and executors. After making provision for the payment of debts and of the legacy to the widow and in regard to the homesteads in Honolulu, the will in clause 5 directs 'that my executrix and executors do pay to my said wife, for the use of herself and our children, as a family allowance, such sum monthly as may from time to time be approved and decreed by the court having jurisdiction of the probate of this will. And the trustees herein provided for, from and after their entry upon their functions of trust hereunder, shall make such further provision for the maintenance of said children as is hereinafter directed.' The subsequent direction as to the further provision for maintenance of the children is found in paragraph 10 of the will. Clause 5 of the will

shows that the income for children begins only when family allowance ceases, namely, at the time when the administration is closed and the order of distribution made. This family allowance was continued as a matter of fact up to the time of the order of distribution. The will then provides that 'at and upon the full payment and discharge of the obligations and bequests in paragraphs numbered respectively second and third thereof,' (which date appears to have been February 10, 1902), 'I will and direct that my executrix and executors shall, as soon as may be, conclude the probate proceedings hereunder and obtain a decree of distribution of my estate. And I do give, devise and bequeath unto the trustees hereinafter named, and to those of them who shall be living and resident within the Hawaiian Islands at the date of such decree, all the rest, residue and remainder of my estate, not hereinbefore otherwise given, devised or bequeathed.' Thus the testator has expressly named the time when the trustees should take the property and enter upon their functions of trust, namely, at the date of the decree of distribution. The will makes provision as to the homesteads and then directs the trustees to reduce to possession all of the property distributed to them, and to hold, manage, control and preserve it, and to collect all the rents, issues, profits and income thereof, and to keep separate, during the life of the wife, the accounts pertaining to realty from the accounts pertaining to the balance. This direction as to the separation of the accounts shows very clearly, in connection with the next clause of the will giving the wife one-third of the net income from the realty, that this net income is that which is collected by the trustees after their entry upon their functions of trust. Then follows that portion of the tenth clause of the will which is applicable to the case at bar, as follows: 'And the remaining two-thirds of the net income, rents, issues and profits of and from said realty, during the natural life of my said wife, and after her death, the entire net sum thereof, shall be by my said trustees included in one fund with the net income and revenue of and from all my estate other

than such realty, which shall be under their control by virtue of this will, and such fund shall be by them at stated intervals of not more than six months divided into as many equal parts as shall be then *in esse* any of my children by my said wife, and shall be by said trustees paid to my said children from and after their respective majority or marriage share and share alike.' This income to be paid to the children is to begin at the same time as the payment of income to the wife and is only income collected by the trustees after the close of administration.

"It is argued that the testator never intended the children and widow to be deprived of income for more than three years after the administration should have been closed and the decree of distribution made. The difficulty with that contention is that he has said in clear and unmistakable language what income is to be paid the widow and children and when its payment is to begin. That he did not intend that the widow and children should be without income at any time probably is so, and he provided against just such a contingency by directing a payment of family allowance during administration and of family maintenance and income after administration." (Reported in 18 Haw., 342-345 *et seq.*)

B.

We recognize fully the principle laid down in a class of cases (some of which are here cited) to the effect that the gift of the residue of the income of an estate entitles the legatee to such income from the time of the death of the testator, *where no other time is fixed.*

None of the cases to be found in the books, however, go further than to hold that "where the income of the testator's residuary estate is bequeathed to a legatee for life, *and no time is prescribed in the will for the commencement or enjoyment of the use or the income* of such residue, * * *

then the person so taking such residue for life is entitled to the proceeds from date of the death of the testator.

Williamson *vs.* Williamson, 6 Paige Ch. (N. Y.), 298.

Flornes *vs.* Young, 9 Ves. Jr., 549.

Cook *vs.* Meeker, 36 N. Y., 15.

Lamb *vs.* Lamb, 1 Pick. (Mass.), 371.

Bancroft *vs.* Security Co., 50 Conn., 736.

Lovering *vs.* Minot, 9 Cush. (Mass.), 151-6-7.

In the last-mentioned case, which is probably the strongest that can be cited in support of the view urged by appellants in this behalf, wherein was held that the income to be divided related back to the date of the death of the testator, the court says: "The words of the will are 'the income,' with nothing to restrain them, and make them include anything less than the whole income." We contend that this is not true in the case at bar, and that there are words and expressions throughout the entire first part of the will restraining and limiting the income to be divided to that which may arise after the distribution to the trustees. While recognizing the general modern rule laid down in the cases cited above, we do not think that it should apply in the construction of this will, as the testator's intention clearly and conclusively negatives such an interpretation throughout.

C.

Although it is true that under the will the persons named as executors are also the trustees, by reason whereof it may be contended that no actual transfer of the property in their possession was necessary, and their right as executors to collect the rents ceased when the debts and the widow's legacy were paid, we submit that their rights and duties in the two capacities were entirely separate and distinct, and under the terms of the will (paragraph 1) the duty of collecting rents accruing from the realty remained with them as *executors*

"pending the distribution" of such realty to themselves as *trustees*.

The executors were directed by said paragraph 1 of the will to reduce *the whole estate*, realty as well as personalty, into their possession, to manage it, and collect the income *pending distribution;* and paragraph 6 of the will clearly shows that the devise to the trustees was not to take effect until the decree of distribution, either of realty or personalty.

The following cases plainly establish the point that even where trustees and executors are the same persons their functions are wholly distinct and the trustees in no way take over their functions till the actual closing of administration, the settlement of the final accounts, and the distribution of the property:

> Estate of Higgins, 28 L. R. A., 116, 124, 126.
> Carr *v.* St. Paul's Parish, 51 At., 920, 921.
> Cranson *v.* Wiley, 71 Mich., 356, 359.
> Guardianship of Long Minors, 7 Haw., 371.
> 11 Encyc. Law, 810.
> M'Claskey *v.* Barr, 79 Fed., 408, 416.
> Blanchard *v.* Williamson, 70 Ill., 647, 560.

That the order of distribution, made on July 3, 1905, extended to the real property, which up to that time had been in the possession of the executors, and from which they had been collecting rents, expressly appears.

That order provides that—

> "Said executrix and executors do deliver over the property remaining in their hands which is described in the schedule hereto annexed to themselves as trustees" * * * (R., 136).
>
> "And the schedule expressly includes the real property and all thereof" (R., 136).

Furthermore, the receipt of the trustees reads in part as follows:

> "We do hereby acknowledge the delivery of possession to us of the following real property" * * * (R., 138).

It is plain that up to July 3, 1905, the *executors* did hold the real property, and were meant by the will to hold it until distribution, and that the income from the realty was by the testator's expressed directions placed on the same footing with the income from the personalty. This appears clearly, as we contend, throughout the entire will.

D.

We believe it is obvious from the will itself that the entire scheme of the instrument contemplates that during the whole of their incumbency the personal representatives shall have control of the entire income of the estate, and that no distinction whatever is made during that period by the testator as to such income, "whether from personalty, from realty, or from any other source." This was the view taken by the Hawaiian Supreme Court, that court holding that, the will making no such distinction, the cash on hand at the date of the testator's death, together with the income of his estate from *all sources*, was liable for the payment of the widow's legacy, and that such *general income* during the whole of said administration period was also available and liable for the payment of "family maintenance," expenses of administration, etc. (R., 154, 155).

This general purpose is, we claim, recognized in paragraph 3 (R., 7, 8), making provision for the payment of the legacy to the widow. The time in which such payment is to be made is made to depend entirely upon the "INCOME and interest of the *estate*," and in this connection it is also provided that no real estate is to be sold, and no personal property is to be sacrificed, as a means of raising such sum. This latter injunction is emphasized and made stronger by paragraph 12 of the will (R., 10), which almost peremptorily directs that the estate (realty and personalty) is to be kept intact and administered under the name of "The Estate of James Campbell." The mere fact that the period of two years is given the executrix and executors within which to

pay this legacy is, in itself, presumptive evidence that the testator intended the income of the entire estate to be at the disposal of the personal representatives for the purpose of carrying out the directions in the will contained, including the payment of such legacy. If this be true, how then can it be for a moment contended that, under the terms of the will, the widow is entitled to share in the income of the realty, under paragraph 9 of the instrument, from the date of the death of the testator? Such a proposition is absolutely negatived by the will itself. (See, in this connection, 2 Jarman on Wills (5th Ed.), 613.)

While it is unquestionably true that personal estate, in the absence of expressions in the will to the contrary, is primarily liable for the payment of the legacy (Roper on Legacies, p. 692; 19 A. & E. Ency. of Law, p. 1302), yet a testator may by his will indicate an intention to constitute his real estate or particular portions of his property, either real or personal, or both, the primary fund for this purpose, and where such intent can be gathered from the will a court of equity will give it effect.

Gardner *vs.* Gardner, 3 Mason (U. S.), 178.
Matter of Woodworth, 31 Calif., 617.
Scott *vs.* Morrison, 5 Ind., 551.
Quimby *vs.* Frost, 61 Me., 77.
Atwater *vs.* Fowler, 1 Edw. (N. Y.), 417.
Risk's Appeal, 110 Pa. St., 171.

In this particular instance the legacy being chargeable against the "estate," and the testator having prohibited the payment of the same out of the corpus of the estate, the income of both the realty and personalty is unquestionably liable.

The authorities are unanimous in holding that a direction for payment of legacies out of the testator's "estate" includes

realty as well as personalty (and income of realty as well as income of personalty).

Van Winkle *vs.* Van Houten, 3 N. J. Eq., 172.
Worth *vs.* Worth, Admr., 95 N. C., 239, 242-4.
Lloyd's Estate, 174 Pa. St., 184-6.
Hunt *vs.* Hunt, Ex'x, 4 Gray (Mass.), 190-3.
Gorman *vs.* McDonnell (Ala.), 28 So. Rep., 964-6.
Longacre *vs.* Stiver, 135 Ind., 585-6.
Harris *vs.* Fly, 7 Paige (N. Y.), 421.
Jackson *vs.* Hpisel, 17 Johns. (N. Y.), 281-3-4.
Schouler on Wills (2d Ed.), sec. 510 and cases cited.

Here our claim is that the legacy provided for in paragraph 3 to the widow is chargeable on both the income of the realty and personalty of the estate, and the authorities not only sustain the proposition that such a charge may be indicated by the terms of the will, but they go even further and hold that a charge of legacies on the income may be restricted to the income of the land alone where it appears that such is the intention of testator.

Mudd *vs.* Powers, 136 Mass., 273-4-6.
Kingsland *vs.* Betts, 1 Edw. Ch. (N. Y.), 596-601.
Wilson *vs.* Halleby, 1 Russ. & M., 590.

In view of the evident intent of the testator in that regard, as the same is to be ascertained and gathered from a reading of the will as a whole, and his expressed directions as herein referred to with respect to the time when the widow's right to share in such income should begin, we submit that the Supreme Court of Hawaii did not err in holding that the widow is not entitled under the ninth clause of the will of James Campbell, deceased, to any share of the income of the realty of the estate pending the closing of the administration of the estate and distribution thereof to the trustees.

Case No. 107.

A.

Before entering into a discussion of the question as to whether the Supreme Court of Hawaii erred in affirming the decree of the judge of the Circuit Court of the First Circuit, dismissing complainant's bill of complaint (which is the sole point involved in this appeal), we desire to suggest that the original appellant herein, Abigail K. Campbell Parker, was not, nor are her personal representatives, who have been substituted herein as appellants since her death, entitled to this appeal, and the same should be dismissed.

As has been stated, *supra*, no appeal was taken by the widow, the original appellant herein, from the decree of the judge of the Circuit Court sustaining the demurrers to the bill. The pending appeal was taken by her from the decree of the Supreme Court of Hawaii affirming the decree of the circuit judge.

It is settled in this court that:

> "One who does not appeal from a decree is not entitled, on appeal from a decree of affirmance, to contest a provision of the original which is merely affirmed by the latter."
>
> Harrison *vs.* Perea, 168 U. S., 313 (42: 478-483).

The decree of the Hawaiian Supreme Court in this case (R., 33) was simply an affirmance of the decree of the lower court sustaining the demurrers and dismissing the bill (R., 26), and we respectfully submit that not having appealed from the original decree made by the circuit judge, under the authority of the case cited the appeal in this case should be dismissed.

B.

Under this appeal *the only* question which can be properly considered, even should the court hold that the appellants have a right to prosecute the appeal, is whether the Supreme Court of Hawaii erred in affirming the decree of the judge of the Circuit Court of the First Circuit sustaining the demurrers and dismissing the complainant's bill (R., 33). We contend there was no error in this behalf.

The facts alleged in the bill have been set out, *supra*, the stated purpose of the bill being to ascertain *when* the administration closed and the estate was distributed to the trustees.

The demurrer of these respondents (R., 24-25), the sustaining of which (R., 26) was affirmed by the Hawaiian Supreme Court (R., 33), was based in substance on the following grounds: (1) want of equity, in that it appears from the bill when the administration was closed and the estate was distributed to the trustees, and (2) that the matters on which advice is sought in and by said bill are *res adjudicata*.

(1) *Bill without equity.*

From the will of James Campbell, deceased, which is attached to and made a part of complainant's bill, we contend it is plain that all of the property belonging to his estate, *real, personal and mixed*, passed to the executrix and executors thereunder, and that it was only from and after the close of the administration that any property was to vest in the trustees (Pars. 1, 6, and 8 of the will; R., 8, 9, and 10).

In paragraph 3 of the previous bill filed by the trustees for a construction of this same will they alleged that they, as executrix and executors, were directed by order of the probate court duly made and filed on the 3d day of July, 1905, "to distribute and have distributed to themselves, as

residuary devisees and legatees in trust, the residue of the property, *real and personal,* belonging to the said estate" (case No. 106, R., 1, 2).

From the allegations of paragraph X of the bill herein (R., 4) it affirmatively appears that the administration of the estate of James Campbell, deceased, closed on the third day of July, 1905, that being the date that the decree of distribution was obtained and the devise to the trustees took effect (paragraph 6 of the will; R., 9).

In and by paragraph XV of the bill (R., 6) it is made to appear that the Hawaiian Supreme Court by a former adjudication had already determined that neither the widow nor the children of James Campbell, deceased, were entitled to any part of the income of the estate until "after the administration is closed and the estate is distributed to the trustees."

We contend that the date of the actual closing of the administration, as last above set out, is and was controlling for all purposes, including the purposes referred to in paragraph XVII of complainants' bill (R., 6), and that in view of the prior decision of the Hawaiian Supreme Court to the effect that neither the widow nor children of the testator are entitled to any share of the income of the estate until after such distribution there can be no legal foundation for the alleged doubt referred to in said paragraph.

While conceding the broad powers of courts of equity in general, we nevertheless submit that where a particular event (as here the distribution of the trustees) is shown to have actually occurred on a day certain, as fixed by the decree of a court of competent jurisdiction, not even such courts of equity, in the absence of a showing of fraud or mistake, can arbitrarily go behind such decree and say that such event shall be deemed or held to have occurred on some other and different date. That is practically the purpose of the bill filed in this cause.

We therefore say that the bill on its face is without equity,

and that on this ground alone the demurrer was properly sustained and the bill dismissed.

(2) *The matters upon which advice is sought are res adjudicata.*

We submit that in passing upon this branch of the demurrer, in order to determine just what question was presented and decided in the former suit, this court has the right to and will inspect its records in the former proceeding (case No. 106).

An appellate court may inspect its own records in another case either on suggestion of counsel or upon its own motion.

> Denny *vs.* State, 144 Ind., 503-517, citing
> Washington R. Co. *vs.* Cœur D'Alene, 160 U. S., 77.

The bill on file in that case (paragraph 3, hereinbefore referred to; case No. 106, R., 1, 2) discloses that complainants therein *affirmatively allege that on July 3, 1905, they were by order of court discharged as executrix and executors, and directed to distribute to themselves as trustees the property, both real and personal, belonging to the estate.*

The submission on the particular point now involved, as the same appears in said bill in its entirety, is as follows:

> "That the complainants are also uncertain whether, under the provisions of the 9th clause of the said will, the respondent, Abigail K. Campbell Parker, is entitled to any share of the income of the realty of the estate pending the close of the administration" * * * (No. 106, R., 6).

In other words, after first saying to the court that the administration of the estate closed on July 3, 1905, and that the estate, both real and personal, was then ordered distributed to the trustees, the complainants in their said former bill asked the court if the widow of the testator was

entitled to share in the income pending such closing of the administration.

The question, in the form in which it was submitted, related to every instant of time from the date of the death of the testator up to the time of the closing of the administration as thereinbefore set out.

As to the meaning of word "pending" see:

Ex parte Mumford, 56 Mo., 603-606.
Century Dictionary, *definition.*

In answering this question, as stated *supra,* the Supreme Court of Hawaii said:

> "We have no hesitation in answering this question in the negative. It is only after the administration is closed *and the estate is distributed to the trustees* that either the widow or any of the children begin to share in the income and it is only from that time that the accounts are to be kept separate and the income apportioned."

Mr. Justice Wilder, delivering the opinion of the court in this case (No. 107, R., 30), most pertinently observes:

> "What was concerned in the first suit was the disposition of the income which accrued from the death of the testator, namely, April 21, 1900, to July 3, 1905. What is concerned in this suit is the disposition of that part of the same income which accrued between February 10, 1902, and July 3, 1905. * * * Furthermore, a motion for a rehearing in that (the first) case was filed by one of the defendants and joined in by another, which raised exactly and identically the question now before us. * * * That the actual form of the question as propounded in the former suit was different from the form of the one now submitted is immaterial, in view of the fact that each question seeks advice as to whom certain income should go. It is clear that the question now submitted was submitted and decided in the former suit."

We contend that not only was the very question submitted by the present bill expressly submitted and determined in the former suit, but, even if it were not, that it was an intermediate matter necessarily comprehended and involved in the matters expressly stated and decided, and that complainants were concluded by such former adjudication.

24 Ency. of Law, p. 266.
Beloit *vs.* Morgan, 7 Wall. (U. S.), 6, 9.
New Dunderberg Min. Co. *vs.* Old, 97 Fed., 152.
Hawaiian, etc., Co. *vs.* Wailuku Co., 14 Haw'n, 50-54.

In conclusion, we submit that the appeal in each case (Nos. 106 and 107) should be dismissed, and the decrees entered in said cases respectively affirmed.

Respectfully submitted,

E. M. WATSON,
Attorney and Guardian ad Litem for
Appellees, Kawananakoa Minors.

HAWAIIAN TRUST COMPANY, LIMITED, ET AL., EXECUTOR, *v.* VON HOLT ET AL., TRUSTEES.[1]

SAME *v.* SAME.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Nos. 106, 107. Argued January 26, 1910.—Decided February 21, 1910.

A provision that a definite amount of net income be paid by trustees to the widow does not entitle her to income from the death of the testator, but only from after the executors have been discharged and the property turned over to the trustees.

This rule applies even if, after acceptance by the widow, of the provision in lieu of dower, it appears that the provision is not as advantageous to her as though she elected to take her dower.

In considering whether a provision in a will is as advantageous as dower interest, the fact that the widow is an executor and receives commissions may be considered.

18 Hawaii, 34, 342, affirmed.

THE facts are stated in the opinion.

Mr. Aldis B. Browne, with whom *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. Sidney M. Ballou*, *Mr. Mason F. Prosser*, *Mr. Robbins B. Anderson*, *Mr. F. E. Thompson* and *Mr. C. F. Clemons* were on the brief for appellants.

Mr. E. M. Watson, guardian *ad litem* and attorney for appellees, Kawananakoa heirs.

Mr. W. L. Stanley, *Mr. Henry Holmes* and *Mr. C. H. Olsen* for the trustees, appellees, submitted.

[1] Original docket titles, No. 106, Abigail K. Campbell Parker, Appellant, *v.* Abigail K. Campbell Parker and others, Trustees, etc.; No. 107, Same *v.* Same. On October 11, 1909, suggestion of death of appellant and substitution of Hawaiian Trust Company as appellant. January 24, 1910, suggestion of death of appellee and substitution of Hannah Martin Von Holt as trustee, appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are bills in equity, brought by the respondents, trustees under the will of James Campbell, for instructions as to the meaning of a clause in the will. James Campbell died on April 21, 1900, leaving large amounts of real and personal property. His will was proved on June 26, 1900. By it the same persons were made, first, executors, and afterwards trustees. On July 3, 1905, a decree of distribution was made discharging the executors and ordering them to turn the property over to themselves as trustees. The testator left a widow and children, and the question before the court is whether the widow, the appellant, is entitled to any part of the income from realty before the same came to the trustees' hands. The bill in No. 106 originally raised other questions, but the widow is the only appellant, and what we have stated is the single matter here. The Supreme Court decided against the appellant on the merits in 106, the principal case. 18 Hawaii, 34. The bill in 107 was filed after the decree in 106, on the notion that the decree did not fix the time when the widow's income from realty began. The Supreme Court regarded the matter as *res judicata*, but discussed the merits again, and then affirmed a decree dismissing the bill. 18 Hawaii, 342.

By the first clause of the will the executors were to reduce all the estate, real and personal, to possession, to collect the income thereof "pending the distribution thereof" as thereinafter provided and to have the value adjudged. By the second, they were to pay the debts and funeral expenses. By the third, there was given to the widow a sum of money equal to one-third of the value of the personal property only, adjudged as above, after payment of debts, etc. This sum was to be paid in cash, and if the condition of the estate should not warrant the payment of the whole at one time, then it was to be paid "as rapidly as the income and interests of my estate shall permit, without the sale of any real estate, or

the sacrifice of any personal property, as a means of raising such sum, but provided that the entire sum be paid within two years from the date of my decease, and no deferred payments shall, within said period of two years, draw any interest." The fourth clause gives the use and occupation of the testator's dwelling house and grounds, furniture, horses, carriages, etc., to the widow, and to the children so long as they remain unmarried, and the executors or trustees are to keep the house and grounds in suitable condition and repair at the charge of the estate; with further details. The fifth clause directs the executors to pay to the widow "for the use of herself and our children, as a family allowance, such sum, monthly," as may be decreed by the Probate Court, and the trustees after entering upon their functions are to make such further provision for the maintenance of the children as is thereinafter directed. By the sixth clause, after satisfying the second and third, the executors "shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate," and the testator gives to the trustees and to those living and resident within the Hawaiian Islands at the date of such decree all the residue of the estate not before otherwise devised or bequeathed.

The trusts, so far as material, after a further provision in clause seven as to the house and grounds and their contents, are as follows: "Eighth. With respect to all property which shall be so distributed to them," except that mentioned in seven, the trustees are to reduce it to possession and manage it, paying charges and their own commissions. "And to collect all the rents, issues, profits, income and revenue thereof" . . . "and to invest and reinvest, and keep invested," and at will to change the investment of any and all moneys that shall come to their hands by virtue hereof" not otherwise specially disposed of, "and to segregate, and keep separate and apart, (during the life of my wife,) the accounts of and pertaining to the realty of my Estate from the accounts pertaining to any and all other thereof." "Ninth: And from

and out of the net income, rents, issues and profits of and from the realty last aforesaid said Trustees shall pay the equal One Third part or portion thereof, in semiannual or, (at the discretion of said Trustees,) more frequent payments, to my said wife, for and during the remainder of her natural life." *Habendum* to her absolutely. By the tenth clause the remaining two-thirds of the net income "from said realty" are given to the children with a proviso for their minority and making surplus revenues capital. Finally the sixteenth clause states that the provision made for the widow "is intended, and shall be by her accepted, (if at all,) in lieu and full satisfaction of her dower interest in my Estate."

It will be seen from the dates of the probate of the will, June 26, 1900, and of the decree turning over the property to the trustees, July 3, 1905, that probably a longer time was taken to finish the administration than the testator expected, and that if the widow did not have a right to her third of the income from the real estate until in fact the estate went to the trustees, she will lose a considerable sum that has accumulated in the meantime. The loss is made the more aggravating that the estate seems to have been ready for distribution on February 10, 1902. Nevertheless we think that any doubts are artificial and agree with the Supreme Court of Hawaii that the language of the will is too clear to admit any interpretation but one. It is said that the provision is in lieu of dower and that the will as construed leaves her worse off than if there had been no will. Whether that would be so or not, if we take into account that she is one of the executors and trustees, getting her share of the commissions, we do not know or think of much importance. The testator seems to treat it as an open question whether she will accept the provision. However that may be, the words are explicit. The eighth clause purports to deal only with the "property which shall be so distributed to them." That phrase dominates the whole clause. It is the rents "thereof" that they are to collect, as by clause one the executors were to collect all in-

come before distribution; the accounts pertaining to the realty, that is the realty so distributed to them, are to be kept separate, and the ninth clause gives the widow one-third of the income of "the realty last aforesaid." It is argued that under the earlier clauses the realty and accrued income would be kept intact and that it is reasonable to suppose that the testator meant his wife to have one-third of the income of the land as she had one-third of the personalty. It might be reasonable to suppose so if the testator had not declared in terms what he meant. What he gave was not one-third of the income [of the realty] generally, as in *Lovering* v. *Minot*, 9 Cush. 151, and as it was taken to be by the probate judge, but one-third of the income of the realty 'last aforesaid,' that is, the realty distributed to the trustees. It was one-third of the income of the realty in the hands of the trustees, the income collected by them from it, and of which they were to keep a separate account. Perhaps the testator thought that the family allowance provided in clause five would be a sufficient substitute during the relatively short time for which he thought that the administration would last. Perhaps he did not think of the event that has happened at all. It would seem that the widow had herself partly to blame for the delay between February 10, 1902, and July 3, 1905, as she was an executrix and trustee. At all events we are of opinion that she took no income from real estate, *eo nomine*, before July 3, 1905, and did take her share from that date.

Decrees affirmed.